Gen. No. 10618 Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND ... 50 I.A. 56

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...ourt of
...le County

...rio Carbone, plaintiff appellee, for many years owned an improved building used for a garage in the City of Streator, Illinois. In 1942 he leased this building to Robert E. Sparks, defendant appellant, for two years at $100.00 per month with options to renew the lease at increased rents for additional three and five-year periods. This lease also contained an option to purchase within two years for $13,000.00. The defendant went into possession under this lease.

For a short time prior to December 18, 1945 the parties had various negotiations with reference to a new lease on the building. It appears from the testimony, largely undisputed, that the defendant desired a lease for a longer term partly because he contemplated making extensive repairs on the building.

The plaintiff is an Italian about 87 years old. He came to this country from Italy some fifty years ago. He speaks Italian and a little English, but he does not understand or speak English very well. He accumulated some property concerning which he had various business transactions including

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Gen. No. 10618 Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952

LIBORIO CARBONE, Plaintiff and Appellee, vs. ROBERT E. SPARKS, doing business as Streator Motor Company, Defendant and Appellant.	Appeal from the Circuit Court of La Salle County

ANDERSON -- J.

Liborio Carbone, plaintiff appellee, for many years owned an improved building used for a garage in the City of Streator, Illinois. In 1942 he leased this building to Robert E. Sparks, defendant appellant, for two years at $100.00 per month with options to renew the lease at increased rents for additional three and five-year periods. This lease also contained an option to purchase within two years for $13,000.00. The defendant went into possession under this lease.

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Gen. No. 12014 Agenda No. 4

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952

ILDORIO DIONORE, Plaintiff and Appellee,	Appeal from the
vs.	Circuit Court of
ROBERT E. PETERS, doing business as Theater Motor Company, Defendant and Appellant.	La Salle County

ILDORIO -- 1.

Ildorio Dionore, plaintiff appellee, for many years owned an improved building used for a garage in the City of Streator, Illinois. In 1942 he leased this building to Robert E. Peters, defendant appellant, for two years at $100.00 per month with options to renew the lease at increased rents for additional three and five-year periods. This lease also contained an option to purchase within two years for $12,000.00. The defendant went into possession under this lease.

For a short time prior to December 1, 1945 the parties had various negotiations with reference to a new lease on the building. It appears from the testimony, largely undisputed, that the defendant desired a lease for a longer term partly upon -- he contemplated making extensive repairs on the building.

The plaintiff is an Italian about 87 years old. He came to this country from Italy some fifty years ago. He speaks Italian and a little English, but he does not understand or speak English very well. He inexperienced case property concerning which he had various business transactions including

those for the garage building in question.

Manley Davis, an attorney who had practiced in Streator, Illinois since 1932, had been the plaintiff's attorney for many years, having drafted the 1942 lease on the garage building. In 1945 the plaintiff also resided in Streator across the street from his son, Leo Carbone. At this time his sons James Carbone and Frank Carbone and his daughter, Agnes Guttilla, also resided in Streator, Illinois. The sons and daughter were all middle-aged and had lived in this country for many years. It appears that all understood Italian and English but had very little formal education. Agnes had less business experience than her brothers. James Carbone was engaged in the trucking business, apparently with some degree of success. Leo Carbone, who had more to do with the transaction involved here than the rest of the family, had been committed to the Elgin State Hospital for a mental illness for three months shortly prior to the date in question and had been discharged. The only indication from the testimony in the record that he was in any way mentally incompetent at the time of the lease transaction is the testimony of his brothers and sister. Prior to the date of the execution of the lease the defendant had a conversation with the plaintiff saying that he wished a new lease on the building. None of the details of it were then discussed. About the same time the defendant discussed the matter of a new lease with Leo Carbone. The reasons for this discussion with Leo, as testified to by the defendant, were that he could not understand the father who spoke little English. Defendant asked Leo to talk the matter over with his father and told Leo that his attorney was R. A. Powers. Leo told the defendant that Manley Davis was his father's attorney and that defendant should discuss the matter of the lease with Mr. Davis. At this time Davis was in the Navy but home on a furlough. The lease was drafted by Mr. Powers and after some minor changes was approved by Mr. Davis. Davis testified that from his conversations with Leo he understood the lease as finally drafted was in conformity with the plaintiff's wishes. Prior to the evening of the execution

there for the garage building in question.

Manley Jones, an attorney who had practiced in Streator, Illinois since 1922, had been the plaintiff's attorney for many years, having drafted the 1942 lease on the garage building. In 1945 the plaintiff also resided in Streator across the street from his son, Leo Carbone. At this time his son Jesse Carbone and Frank Carbone and his daughter, Agnes Carbone, also resided in Streator, Illinois. The sons and daughter were all middle-aged and had lived in this country for many years. It appears that all understood Italian and English but had very little formal education. Agnes had less business experience than her brothers. Jesse Carbone was engaged in the trucking business, apparently with some degree of success. Leo Carbone, who had more to do with the transaction involved here than the rest of the family, had been committed to the State State Hospital for a mental illness for three months shortly prior to the date in question and had been discharged. The only indication from the testimony in the record that he was in any way mentally incompetent at the time of the lease transaction is the testimony of his brothers and sister. Prior to the date of the execution of the lease the defendant had a conversation with the plaintiff saying that he wished a new lease on the building. None of the details of it were then discussed. About the same time the defendant discussed the matter of a new lease with Leo Carbone. The reasons for this discussion with Leo, as testified by the defendant, were that he could not understand his father who spoke little English. Defendant asked Leo to talk the matter over with his father and told Leo that his attorney was L. . Jones. Leo told the defendant that Manley Jones was his father's attorney and that defendant should discuss the matter of the lease with Mr. Jones. At this time Leo was in the Navy but home on a furlough. The lease was drafted by Mr. Jones and after some minor changes was approved by Mr. Jones. Jones testified that from his conversations with Leo he understood the lease was in fact drafted was in conformity with the plaintiff's wishes. Prior to the execution of the execution

of the lease, Davis had no conversation with the plaintiff concerning the same. After the proposed lease had been drafted it was agreed by Mr. Sparks, Mr. Davis, and Leo Carbone that they would meet in the evening at the Carbone home to discuss the lease. Leo in the meantime had arranged for his sister, Agnes, and his brother, Frank, to be present. James Carbone was not notified of the meeting. The defendant, R. A. Powers, and Manley Davis went to the Carbone home. When they arrived Liborio Carbone, Leo, Agnes, and Frank were there.

The new lease executed and signed by the parties provided in substance that it was to commence on January 1, 1946, the rent to be $140.00 per month until May 1, 1947 and $150.00 per month thereafter. The term of the lease was seven years with an option to the lessee to renew for two additional five-year terms, the rent to be paid during this ten-year period being $150.00 per month. The lessee also was given an option to purchase the garage building at any time during the life of the lease or during the seventeen-year period for $13,000.00. Lessee was given the right to improve the building by repairs as he saw fit.

After discussion of the terms of the lease it is admitted that the plaintiff and the defendant both signed the same. What was said and done by the parties and those present prior to the signing of the lease is strenuously controverted by the testimony of those present. An evaluation of this testimony to determine its legal effect and credibility is necessary for the disposition of the issues.

Liborio Carbone testified that Manley Davis read the lease outloud in English and that no one translated it into Italian for him; that he did not understand the lease; that no one explained it to him; that he did not know the lease contained an option to purchase; that he had not authorized his son, Leo, to negotiate the lease; that he knew that Leo had arranged a meeting to discuss the lease; that Davis told him that the lease was on the same plan as the other one; that Leo said "If that was the kind, it was all right to sign."

of the lease, Davis had to converse with the plaintiff concerning the same. After the proposed lease had been drafted it was agreed by Mr. Davis and Leo Durone that they would meet in the evening at the Durone home to execute the lease. Leo in the meantime had arranged for his sister, Emma, and his brother, Frank, to be present. Lemon Durone was not notified of the meeting. The witnesses, T. L. Powers, and Emily Davis went to the Durone home. When they arrived Gilberto Durone, Leo, Emma, and Frank were there.

The new lease executed and signed by the parties provides in substance that it was to commence on January 1, 1964, the rent to be $140.00 per month until July 1, 1969 and $150.00 per month thereafter. The term of the lease was seven years with an option to the lessee to renew for two additional five-year terms, the rent to be paid during this ten-year period being $150.00 per month. The lessee also was given an option to purchase the garage building at any time during the life of the lease or during the renewal-year period for $13,000.00. Lessee was given the right to improve the building by repairs as he saw fit.

After discussion of the terms of the lease it is contended that the plaintiff and the defendant both signed the same. What was said and done by the parties and their agents prior to the signing of the lease is strenuously controverted by the testimony of those present. An evaluation of this testimony by measuring its legal effect and credibility is necessary for the determination of the issues.

Lemon Durone testified that Gilberto Davis read the lease aloud in English and that no one translated it into Italian for him; that he did not understand the lease; that no one explained it to him; that he did not know the lease contained an option to purchase; that he had not authorized his son, Leo, to negotiate the lease; that he knew that Leo had arranged a meeting to discuss the lease; that Davis told him that the lease was on the same plan as the other one; that Leo told "if that was the kind, it was all right to sign."

Agnus Guttilla testified that Leo had told her that her father wanted to see her and that was the reason she went to his home on the evening in question. She testified that Davis read the lease to her father; that Frank said he did not understand it; that Davis became impatient with Frank and said that it was like the old one; that her father did sign the lease; that she knew nothing about the option clause in the lease. She denied that Davis said to Frank concerning the effect of the option clause that "Yes, that means he could buy the building tomorrow if he wanted to." She testified that she was not acquainted with business affairs and in substance that she had little comprehension of what was going on.

Frank Carbone testified that Davis "was reading the lease to Leo and the old man"; that he asked Davis to explain it and he said "That's all right"; that they went into the kitchen to sign the lease and Davis said "It's perfectly all right. It was like the old one and the old man finally signed the lease." The witness stated that Davis did not say anything about the option; that after the lease was signed his dad asked Davis "How much is for the lease?"; that he said $5.00 and the old man paid him. He further testified that "Leo was the translator from English into Italian for my father."

Leo Carbone was called as a witness by the plaintiff under section sixty (60) of the Practice Act. He testified that prior to the signing of the lease he had some conversation with the defendant about a new lease; that the defendant told him that he had to get a new lease at once; that he replied "Sparks, the $13,000.00 is going to be out this time"; that the defendant later told him on the day of the meeting that he had to have the lease "pretty quick" and he said "I will talk to my dad"; that defendant gave him a roll of bills amounting to $250.00 and told him "He wanted me to have a lease signed that night"; that he never told anyone else about getting the money; that prior to signing the lease at the Carbone home, when it was being discussed, he mentioned to Davis the option in the lease and Davis did not listen to him and said "I am your father's lawyer and everything is made out right."

Agnes Dutthilla testified that Leo had told her that her father wanted to see her and that was the reason she went to his home on the evening in question. She testified that Davis read the lease to her father; that Frank said he did not understand it; that Davis became impatient with Frank and said that it was like the old one; that her father did sign the lease; that she knew nothing about the option clause in the lease. She denied that Davis said to Frank concerning the effect of the option clause that "Yes, that means he could buy the building tomorrow if he wanted to." She testified that she was not acquainted with business affairs and in substance that she had little comprehension of what was going on.

Frank Carbone testified that Davis "was reading the lease to Leo and the old man"; that he asked Davis to explain it and he said "That's all right"; that they went into the kitchen to sign the lease and Davis said "It's perfectly all right. It was like the old one and the old man finally signed the lease." The witness stated that Davis did not say anything about the option; that after the lease was signed his dad asked Davis "How much is for the lease?"; that he said $5.00 and the old man paid him. He further testified that "Leo was the translator from English into Italian for my father."

Leo Carbone was called as a witness by the plaintiff under section sixty (60) of the Practice Act. He testified that prior to the signing of the lease he had some conversation with the defendant about a new lease; that the defendant told him that he had to get a new lease at once; that he replied "Sparks, the $13,000.00 is going to be out this time"; that the defendant later told him on the day of the meeting that he had to have the lease "pretty quick" and he said "I will talk to my dad"; that defendant gave him a roll of bills amounting to $25.00 and told him "He wanted me to have a lease signed that night"; that he never told anyone else about getting the money; that prior to signing the lease at the Carbone home, when it was being discussed, he mentioned to Davis the option in the lease and Davis did not listen to him and said "I am your father's lawyer and everything is made out right."

He further testified that Davis read the lease paragraph by paragraph and he, Leo, translated it to his father; that there was nothing said or read by Davis concerning an option to purchase in the lease. He denied that Davis was asked by some of the family if the option clause meant that Mr. Sparks could buy the property for $13,000.00 and that Davis replied "Yes, he could buy it tomorrow if he wanted to."

Manley Davis testified for the defendant that on the evening in question before all those present at the Carbone home he read the lease paragraph by paragraph in English to Leo who then spoke in Italian to his father; that they then discussed in Italian what he had read; that after considerable discussion between Leo and his father, and at times Frank Carbone, the plaintiff and the defendant signed the lease; that the plaintiff wanted to pay him a fee; that he told him he could not take a fee but he accepted a present of $5.00. He further testified that at the time Leo or Frank asked him "Does this mean that Sparks could buy the building" he replied "Yes, it means he could buy it tomorrow morning if he wanted to"; that after this conversation there was some discussion in Italian between Leo and his father -- "In fact there was considerable discussion in Italian and occasionally an English word would crop out"; that he assumed part of the discussion between Leo Carbone and his father was concerning the option to purchase. The witness stated that he did not understand what was said in Italian. The witness further stated on cross examination that he did not know Leo had been in the Elgin State Hospital; that he had not discussed the lease with the plaintiff before the night the lease was signed; that he read the draft lease not more than twice; that he was representing the plaintiff more or less as a friend; that at the time he approved the lease he thought it was an advantageous situation for Mr. Carbone; that when he left the house on the night in question he "thought that Liborio Carbone fully understood the terms of that lease"; that on the night in question the defendant explained the nature of the repairs he contemplated on the building.

He further testified that Carla read the letter aloud to Leo and he, Leo, turned and ran to his father; that there was nothing said or done by Carla concerning an action to overhear in the lower. It appeared that Carla was asked by some of the family if the option clause meant that Carlo Quarino could buy the property for $13,000.00 and that Carla replied "Yes, he could buy it whenever it he wanted to."

During cross examination the defendant then on the evening in question before all those present at the Quarino home he read the lease particularly the provision in English to Leo who then spoke in Italian to his father; that then discussed in Italian what he had read; that after considerable discussion between Leo and his father, and at times friends, the plaintiff and the defendant signed the lease; that the plaintiff wanted to pay him a fee; that he said he would not take fees but he recovered a amount of $2.00. He further testified that at the time Leo or Frank asked him "does this mean that Carlo could buy the building" he replied "Yes, it means he could buy in whenever he wanted to"; that after this conversation there was no discussion in Italian between Leo and his father -- "In fact there was considerable discussion in Italian and occasionally in English and only not"; that he received part of the discussion between Leo Quarino and his father was concerning the option to purchase. The witness stated that he did not understand what was said in Italian. The witness further stated on cross examination that he did not know Leo had been in the Elgin State Hospital; that he did not discussed the lease with the plaintiff before the night the lease was signed; that he read the draft lease not more than twice; that he was representing the plaintiff more or less as a friend; that at the time he approved the lease he thought it was a fair one at the time for Mr. Carlo; that when he left the house on the night in question he thought that Alberto Carlo fully understood the terms of that lease; that on the night in question the defendant explained the nature of the rights he acquired on the building.

Robert E. Sparks, the defendant, testified as to what happened at the Carbone home as follows: Manley Davis read the lease aloud in English in the presence of all and as it was read and after it was read Leo interpreted it to his father in Italian. Sparks' testimony as to what happened there in most respects is the same as that of Davis and Powers. He testified that the option clause of the lease was also read and explained by Davis to the Carbone family and that Frank Carbone during the explanation of the option provision said in the presence of all: "If Dad signs that lease, does that mean Sparks can buy the building for $13,000.00" and that Davis said "Yes, he can buy it tomorrow morning." He further testified that he expended between $12,000.00 and $15,000.00 in the improvement of the building and gave the details of these expenditures. He denied that James Carbone or Leo Carbone had ever told him that he was not to have an option although both testified that they had. He denied that he had ever paid or promised to pay Leo Carbone any money for obtaining the lease.

R. A. Powers testified that he was an attorney at law acting for the defendant. His testimony about the preliminary negotiations concerning the lease ~~were~~ was about the same as that of the other witnesses. He was present at the Carbone home when the lease was signed and his testimony was about the same as that of Manley Davis and that of the defendant as to what occurred there. He testified that Davis thoroughly explained the option provision of the lease and that the option to purchase might be exercised at any time; that they went into the kitchen after the conversation and the plaintiff and the defendant signed the lease.

Herbert W. Prafcke and John M. Fialko, real estate brokers in Streator, Illinois, both testified for the plaintiff in substance that the value of the garage building in 1945 was $15,000.00 and that at the time of the hearing in 1949, after the defendant had made improvements to the building, its value was about $25,000.00. This testimony is not disputed.

The above is the substance of the material testimony of the witnesses.

Robert E. Sparks, the defendant, testified as to what happened at the Carbone home as follows: Manley Levit read the lease aloud in English in the presence of all and as it was read and after it was read Leo interpreted it to his father in Italian. Sparks' testimony as to what happened there in most respects is the same as that of Levit and Powers. He testified that the option clause of the lease was also read and explained by Levit to the Carbone family and that Frank Carbone during the explanation of the option provision said in the presence of all: "If Dad sign that lease, does that mean I can buy the building for $13,000.00" and that Levit said "Yes, he can buy it tomorrow morning." He further testified that he expended between $12,000.00 and $15,000.00 in the improvement of the building and gave the details of these expenditures. He denied that James Carbone or Leo Carbone had ever told him that he was not to have an option although both testified that they did. He denied that he had ever paid or promised to pay Leo Carbone any money for obtaining the lease.

M. J. Powers testified that he was an attorney at law acting for the defendant. His testimony about the preliminary negotiations concerning the lease was about the same as that of the other witnesses. He was present at the Carbone home when the lease was signed and his testimony was about the same as that of Manley Levit and that of the defendant as to what occurred there. He testified that Levit thoroughly explained the option provision of the lease and that the option to purchase might be exercised at any time; that they went into the kitchen after the conversation and the plaintiff and the defendant signed the lease.

Herbert J. Fredricks and John M. Fialko, real estate brokers in Streator, Illinois, both testified for the plaintiff in substance that the value of the garage building in 1945 was $15,000.00 and that at the time of the hearing in 1947, after the defendant had made improvements to the building, the value was about $25,000.00. This testimony is not disputed.

The above is the substance of the material testimony of the witnesses.

Shortly after the execution and delivery of the lease in question, the plaintiff appellee filed his complaint in a suit in chancery in the Circuit Court of La Salle County, Illinois, against the defendant appellant. The complaint in substance states the plaintiff's version of the facts and circumstances surrounding the execution of the 1942 and 1945 leases. It further alleges that the plaintiff had never intended to give the defendant an option to purchase the building; that the interpreter did not interpret the option provision of the lease to him; that he executed the lease not knowing it contained this provision; that the defendant executed it then knowing that the plaintiff did not intend to give him the option; that after he learned of this provision, he requested the defendant to cancel the lease but he refused to do so. He asked in the complaint that the 1945 lease be declared null and void and in the alternative, that the option provision be declared null and void but the remainder of the lease remain in effect. He also asked for general equitable relief.

Defendant filed an answer generally denying the allegations in the complaint. The cause was referred to a Special Master in Chancery who, after hearing the testimony of the witnesses, found that the plaintiff was advised of the contents of the 1945 lease and knew or should have known of the option clause and recommended that the plaintiff's suit be dismissed for want of equity. Exceptions were filed and argued before the Chancellor who sustained the exceptions, heard no further testimony, and entered a decree finding that the option provisions of the lease were null and void but the lease otherwise was in effect. Defendant appealed from this decree.

The defendant contends that the plaintiff who admittedly signed the lease cannot escape liability on it because he was aged, illiterate, and did not understand the English language. The law is well established generally and in this State that ignorance of the contents of a written instrument does not relieve liability on it. In the absence of fraud it is presumed

Upon the sale, the execution and delivery of the lease in question, the plaintiff specifies filed his complaint in a suit in chancery in the Circuit Court of La Salle County, Illinois, against the defendant specially. The complaint in substance states the plaintiff's version of the facts and circumstances surrounding the execution of the 1942 and 1947 leases. It further alleges that the plaintiff had never intended to give the defendant an option to purchase the building; that the instrument did not interpret the optical provisions of the lease to mean; that he considered the lease but modifying it contained this provision; that the defendant entered it then knowing that the plaintiff did not intend to give him the option; that after the lapsed of this provision, he requested the defendant to amend the lease but refused to do so. He stated in the complaint that the 1945 lease be declared null and void and of no effectively, that the option provision be declared null and void and the remainder of the lease remain in effect. He also asked for general equitable relief.

Defendant filed an answer generally denying the allegations in the complaint. The cause was referred to a Special Master in Chancery who, after hearing the testimony of the witnesses, found that the plaintiff was advised of the contents of the 1945 lease and that he should have knowed of the option clause and recommended that the plaintiff be held to be bound for good of option. Exceptions were filed and argued before the Chancellor who sustained the master's report to further testimony, and entered a decree finding that the option provisions of the lease were null and void and the lease remained in effect. Defendant appealed from this decree.

The defendant contends that the plaintiff was sufficiently signed the lease cannot escape liability on it because he was young, illiterate, and did not understand the English language. The law is well established generally and in this state that ignorance of the contents of a written instrument does not relieve liability on it. In the absence of fraud it is presumed

that one who signs a written instrument knows its contents. This rule has been applied to the contracts of illiterate persons. It has been said that if they are unable to read or understand the instrument, they should have the contract read to them, and that a failure to obtain such a reading or explanation by others is such gross negligence that it will estop them from escaping liability on the grounds that they were ignorant of its contents. (12 Am. Juris. 628.) This rule of law was followed in Spina vs. Spina, 372 Ill. 50; Malewski vs. Mackiewich, 282 Ill. App. 593; and Shulman vs. Moser, 284 Ill. 134.

There is no doubt that the plaintiff knew he was signing a lease. Its provisions had been explained to him by his son, Leo, in conjunction with his friend and attorney, Manley Davis, and he then voluntarily signed it. Under the law, outside of the question of fraud which will be discussed later in this opinion, the plaintiff is bound by the lease even though he did not fully comprehend or understand it, according to the law as above cited.

The defendant next contends that he committed no actual fraud to obtain the lease. An examination of the complaint discloses that there is little in its language charging defendant with fraud. It does charge that the lease was not correctly interpreted to plaintiff but there is no allegation or evidence that the defendant had anything to do with the interpretation. The only approach to the charge of fraud is where the complaint alleges that the defendant procured the execution of the lease knowing that the plaintiff did not intend to give him an option to purchase the building. It is evident that the basis of the relief sought in the complaint is on the grounds that the plaintiff who was illiterate had signed the lease without knowing what was in it. There is no evidence in the record disclosing that either Leo Carbone or Manley Davis was attempting to perpetrate a fraud on the plaintiff; there is no testimony even inferring that the plaintiff did not have full confidence in his former attorney and friend Manley Davis. Davis testified that he fully read the lease and explained to Frank in the presence of all the family that under the lease, defendant could buy the building at any time

that one who signs a written instrument knows its contents. This rule has been applied to the contracts of illiterate persons. It has been held that if they are unable to read or understand the instrument, they should have the contract read to them, and that a failure to obtain such a reading or explanation by others is such gross negligence that it will estop them from escaping liability on the grounds that they were ignorant of its contents. (12 Am. Jurs. (29.) This rule of law was followed in Quinn vs. Quinn, 272 Ill. 50; Malewski vs. Wolcieviob, 262 Ill. 522; and Bulman vs. Moser, 268 Ill. 129.

There is no doubt that the plaintiff knew he was signing a lease. Its provisions had been explained to him by his son, Leo, in conjunction with his friend and attorney, Manley Davis, and he then voluntarily signed it. Under the law, outside of the question of fraud which will be discussed later in this opinion, the plaintiff is bound by the lease even though he did not fully comprehend or understand it, according to the law as above cited.

The defendant next contends that he committed no actual fraud to obtain the lease. An examination of the consultant discloses that there is little in its language objecting defendant with fraud. It does charge that the lease was not correctly interpreted to plaintiff and there is no allegation or evidence that the defendant had anything to do with the interpretation. The only approach to the charge of fraud is where the complaint alleges that the defendant procured the execution of the lease knowing that the plaintiff did not intend to give him an option to purchase the building. It is evident that the basis of the relief sought in the complaint is on the grounds that the plaintiff who was illiterate had signed the lease without knowing what was in it. There is no evidence in the record disclosing that either Leo Carbone or Manley Davis was attempting to perpetrate a fraud on the plaintiff; there is no testimony ever intervening that the plaintiff did not have full confidence in his former attorney and friend Manley Davis. Davis testified that he fully read the lease and explained to Frank in the presence of all the family that under the lease, defendant could buy the building at any time

during the life of the lease. The question presented here is whether the defendant perpetrated a fraud. It is true that plaintiff's sons and daughter testified that the option clause was not read, but assuming this to be true for the moment, there is no testimony of a plan or plot to have this provision omitted. It seems strange that if the defendant was attempting to perpetrate a fraud, he would have arranged for the plaintiff's attorney and friend and the members of the Carbone family to be present at the meeting. In view of the fact that the meeting was arranged with the parties present, we feel that little credence should be given to Leo Carbone's testimony that bribe money was paid to him by the defendant to obtain the lease. In Leo's testimony on this subject, he does not state that the money obtained was to procure the option which he stated specifically he told the defendant it was not to contain, but that the money was given to obtain the lease for a longer term of years. There is nothing in the evidence connecting the defendant with an attempt to conceal the option provision in the lease from the plaintiff. It has been said that allegations of fraud contained in a complaint must be established by clear and convincing evidence and cannot be based on inferences, surmises, or guesses. (Zilvitis vs. Szczudlo, 409 Ill. 252.) It is urged by the plaintiff that the report of the Master is only prima facie correct and advisory only and may be set aside by the Trial Court or by the Reviewing Court if either determine that the decree entered was not a proper one under the law and the evidence. (Zilvitis vs. Szczudlo, 409 Ill. 252.) It is likewise the law regardless of the above rule that the Master's findings on controverted facts where the witnesses have appeared before him where he may test their credibility by the usual methods of a judge, are entitled to much consideration. The Chancellor in such a case who heard no further testimony is in no better position to judge the credibility of the witnesses than the reviewing Court on appeal and all such facts which determine the credibility of the testimony and the weight of the evidence are open for consideration by the Reviewing Court. (Stasch vs. Stasch, 355 Ill. 581; Thatcher vs. Kramer,

during the life of the lease. The question presented here is whether the defendant repudiated a trust. It is true that plaintiff's son and daughter testified that the oyster planes were not dead, but according only to be true for the season; there is no testimony of a plan or plot to have this repudiation entitled. It seems strange that if his defendant was attempting to perpetrate a fraud, he would have arranged for the plaintiff's attorney and friend and the members of the Crabbe family to be present at the meeting. In view of the fact that the meeting was arranged with the express purpose, we feel that little evidence should be given to the testimony tending that Allen money was paid to him by the defendant to obtain the lease. The lessee testimony on this subject, he was not sure that his money obtained was to procure the lease which he stated specifically he still the defendant it was not to continue, but that his money was given to obtain the lease for a longer term of years. There is nothing in the evidence concerning the defendant with an attempt to conceal the option provision in the lease from the plaintiff. It has been said that allegations of fraud contained in a complaint must be established by clear and convincing evidence and cannot be based on inference, surmise, or guesses. (Hartley vs. Hartley, 324 Ill. 62.) It is urged by the plaintiff that the report of the master is only prima facie evidence and entitled only to be set aside by the trial court or by the reviewing court if either determine that the issues ordered was not a proper one under the law or the evidence. (Hartley vs. Hartley, 329 Ill. 292.) It is likewise the law, that in the case at bar, the trial court and the master's finding in conference with some has adjudged from opposed before him where to say that the credibility of the equal witness or a judge, are entitled to such consideration. The determination in such a case was based on further testimony is in no proper position to judge the credibility of the witnesses than the reviewing court. (Hartley vs. Hartley, 324 Ill. 62.) Where the credibility of the witnesses was the weight of the evidence are open for consideration by the reviewing court. (Brown vs. Brown, 324 Ill. 5; Hartley vs. Hartley, 324 Ill. 62.)

347 Ill. 601; Kosakowski vs. Bagdon, 369 Ill. 252.)

With these rules of law in mind, it appears to us that the testimony in this record falls far short of establishing the charge of fraud. The Master in Chancery who saw and heard the witnesses so found. From our review of the evidence, we are convinced that he was correct. The testimony of the plaintiff's family that Davis, their friend and attorney, intentionally failed to read or that Leo failed to translate the option provision of the lease is so unreasonable and improbable that little credence should be given it. If this testimony were true, there is no evidence connecting the defendant with it.

We find the decree of the Chancellor is manifestly against the weight of the evidence on the question of fraud charged in the complaint. We also find that even assuming that the plaintiff signed the lease without knowing what it contained or its legal effect, this does not vitiate the lease. Considering the basic equities of the plaintiff's cause, it is apparent that the option clause in itself did not create any serious financial loss to the plaintiff. At the time of the lease the garage building had a value of about $15,000.00. This value, of course, was a matter of opinion and may not be mathematically correct. The defendant thereafter expended on the building approximately $15,000.00 and its then value was approximately $25,000.00. The nature and effect of the transaction is not such that fraud would be presumed because of great financial loss to the injured parties.

In view of this opinion it is not necessary for us to pass upon the error assigned arising out of the state of the pleadings.

After careful analysis of the record in this case and the contention of counsel, it is our considered judgment that the decree of the Circuit Court of La Salle County, Illinois should be and is reversed and the cause remanded with directions to dismiss the suit for want of equity.

Reversed and remanded with directions,

347 Ill. 601; Rosekowski vs. Hughes, 369 Ill. 252.)

With these rules of law in mind, it appears to us that the testimony in this record fails far short of establishing the charge of fraud. The master in chancery who saw and heard the witnesses so found. From our review of the evidence, we are convinced that he was correct. The testimony of the plaintiff's family that Davis, their friend and attorney, intentionally failed to read or that Leo failed to translate the option provision of the lease is so unreasonable and improbable that little credence should be given it. If this testimony were true, there is no evidence connecting the defendant with it.

We find the decree of the Chancellor is manifestly against the weight of the evidence on the question of fraud charged in the complaint. We also find that even assuming that the plaintiff signed the lease without knowing what it contained or its legal effect, this does not vitiate the lease. Considering the basic equities of the plaintiff's cause, it is apparent that the option clause in itself did not create any serious financial loss to the plaintiff. At the time of the lease the garage building had a value of about $15,000.00. This value, of course, was a matter of opinion and may not be mathematically correct. The defendant thereafter expended on the building approximately $17,000.00 and its then value was approximately $25,000.00. The nature and effect of the transaction is not such that fraud could be presumed because of great financial loss to the injured parties.

In view of this, motion it is not necessary for us to pass upon the error assigned relating out of the state of the pleadings.

After careful analysis of the record in this case and the contention of counsel, it is our considered judgment that the decree of the Circuit Court of La Salle County, Illinois should be and is reversed and the cause remanded with directions to dismiss the suit for want of equity.

Reversed and remanded with directions.

3123 A

Abstract

Gen. No. 10639 Agenda No. 15

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952 350 I.A. 57

RICHARD A. HENRIKSON, Plaintiff-Appellant, vs. RALPH E. KNOX and R. H. REESE, doing business as K & R TRANSPORTS; K & R TRANSPORTS, INCORPORATED, a corporation; and DONALD H. RICE, Defendants-Appellees.	Appeal from the Circuit Court of Winnebago County.

ANDERSON -- J.

The plaintiff-appellant, Richard A. Henrikson, brought suit in the Circuit Court of Winnebago County for personal injuries and property damage to his car alleged to have been incurred as result of a collision between a passenger car owned and driven by him and a truck owned by K & R Transports, Inc. and being driven by Donald H. Rice, their agent. The Corporation and Donald H. Rice are the defendants-appellees herein. A jury returned a verdict in favor of the defendants. The Court denied the plaintiff's motion for a new trial and entered a judgment for the defendants. The plaintiff has prosecuted this appeal. The plaintiff assigns as error that the verdict of the jury was against the manifest weight of the evidence and that the Court's instructions to the jury were erroneous.

Shortly after noon on November 9, 1949, plaintiff was driving his car in a westerly direction on U. S. Highway number 20, a four-lane highway. As plaintiff approached the intersection of this highway and North Springfield Avenue near Rockford, Illinois, a tractor-trailer truck owned by the defendant

Gen. No. 10639 Agenda No. 15

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952

RICHARD A. HENRIKSON, Plaintiff-Appellant,	
vs.	Appeal from the
RALPH E. KOX and R. E. [illegible], doing business as K & R TRANSPORT; K & R TRANSPORT, INCORPORATED, a corporation; and DONALD H. RICE, Defendants-Appellees.	Circuit Court of Winnebago County.

ABSTRACT -- 1.

The plaintiff-appellant, Richard A. Henriksen, brought suit in the Circuit Court of Winnebago County for personal injuries and property damage to his car alleged to have been incurred as result of a collision between a passenger car owned and driven by him and a truck owned by K & R Transport, Inc. and being driven by Donald H. Rice, their agent. The corporation and Donald H. Rice are the defendants-appellees herein. A jury returned a verdict in favor of the defendants. The Court denied the plaintiff's motion for a new trial and entered a judgment for the defendants. The plaintiff has prosecuted this appeal. The plaintiff assigns as error that the verdict of the jury was against the manifest weight of the evidence and that the Court's instructions to the jury were erroneous.

Shortly after noon on November 9, 1952, plaintiff was driving his car in a westerly direction on U. S. Highway number 20, a four-lane highway. As plaintiff approached the intersection of this highway and North Springfield Avenue near Rockford, Illinois, a tractor-trailer truck owned by the defendant

corporation and driven by the defendant, Donald H. Rice, was also approaching said intersection from the west. The driver of the tractor-trailer truck attempted to negotiate a left turn. The passenger car and the truck collided. The evidence is in conflict as to the speed of the vehicles; the actual point of impact; the giving of a hand signal by the truck driver; and whether or not the truck was stopped or moving at the actual time of impact.

The plaintiff alleged in his complaint that the defendants were guilty of five specific acts of negligence, one or more of which caused the injuries complained of. Briefly they are as follows:

1. Defendants negligently ran into and struck plaintiff's motor vehicle.

2. Defendants negligently failed to give the right of way to plaintiff.

3. Defendants negligently failed to keep their truck under control.

4. Defendants negligently operated the truck at a high and dangerous rate of speed.

5. Defendants negligently and suddenly turned without giving a proper signal.

Defendants by ~~this~~ their answer denied the foregoing allegations of negligence and issue was joined thereon. The evidence is highly conflicting and in many respects irreconcilable.

Appellant assigns as error that the Court improperly gave appellees instructions numbers eleven and seventeen and improperly refused appellant's tendered instruction number two.

Appellees' instruction number eleven is as follows:

> "11. The Court instructs the jury that in this case, the plaintiff, Richard A. Henrikson, has filed his complaint alleging in substance, that on the 9th of November, 1949, he was driving his motor vehicle in a westerly direction on U. S. Route No. 20, toward the intersection thereof with Springfield Avenue in the County of Winnebago and State of Illinois, and that he was at all times in the exercise of ordinary care for his own safety and for the safety of others; it is further alleged that at that time and place the defendants, Ralph E. Knox and R. H. Reese, doing business as K & R Transports, were, by their agent and servant, Donald H. Rice, operating another motor vehicle in an easterly direction on U. S. Route No. 20 toward the intersection thereof with Springfield Avenue, as aforesaid, and that said defendants, by their agent and servant,

corporation and driven by the defendant, Donald E. Rice, was also proceeding said intersection from the west. The driver of the tractor-trailer truck attempted to negotiate a left turn. The passenger car and the truck collided. The evidence is in conflict as to the speed of the vehicles; the actual point of impact; the giving of a hand signal by the truck driver; and whether or not the truck was stopped or moving at the actual time of impact.

The plaintiff alleges in his complaint that the defendants were guilty of five specific acts of negligence, one or more of which caused the injuries complained of. Briefly they are as follows:

1. Defendants negligently ran into and struck plaintiff's motor vehicle.

2. Defendants negligently failed to give the right of way to plaintiff.

3. Defendants negligently failed to keep their truck under control.

4. Defendants negligently operated the truck at a high and dangerous rate of speed.

5. Defendants negligently and suddenly turned without giving a proper signal.

Defendants by their answer denied the foregoing allegations of negligence and issue was joined thereon. The evidence is highly conflicting and in many respects irreconcilable.

Appellant assigns as error that the Court improperly gave appellees instructions numbers eleven and seventeen and improperly refused appellant's tendered instruction number two.

Appellees' instruction number eleven is as follows:

"11. The Court instructs the jury that in this case, the plaintiff, Richard L. Merritson, has filed his complaint alleging in substance, that on the 9th of December, 1949, he was driving his motor vehicle in a westerly direction on U. S. Route No. 20, toward the intersection thereof with Springfield Avenue in the County of Hunterdon and State of Illinois, and that he was at all times in the exercise of ordinary care for his own safety and for the safety of others; it is further alleged that at that time and place the defendants, Ralph V. Knox and A. H. Reese, doing business as K & R Transports, were, by their agent and servant, Donald E. Rice, operating another motor vehicle in an easterly direction on U. S. Route No. 20 toward the intersection thereof with Springfield Avenue, in Illinois, and that said defendants, by their agent and servant,

Donald H. Rice, so negligently drove and propelled with great force and violence into and against the said motor vehicle of the plaintiff, causing personal injuries to said plaintiff, whereby plaintiff sustained damages.

"The defendants, have filed their answer to said Complaint, whereby they deny the allegations of said complaint.

"It is upon the issues formed by the complaint and the answer as aforesaid, that this cause comes on for hearing and determination before the Court and jury."

Appellees' instruction number seventeen is as follows:

"The Court instructs the jury that the plaintiff cannot recover from the defendants herein unless and until he proves by the greater weight or preponderance of the evidence and under the instructions of the Court, each and all of the following propositions:

"First, that the plaintiff, Richard A. Henrikson, just before and at the time of the occurrence in question, was using reasonable and ordinary care for his own safety, and

"Second, that the defendants were guilty of the negligence charged against them, and

"Third, that the negligence, if any, of the defendants was a proximate cause of the injuries complained of.

"If the plaintiff failed to prove any one of the foregoing propositions by the greater weight or preponderance of the evidence, he cannot recover from the defendants in this case."

Appellant's tendered instruction number two, refused by the Court, is as follows:

"2. The complaint alleges that the plaintiff was injured and sustained damages while exercising reasonable care for his own safety, and that the defendants were guilty of the following acts of negligence and omissions which directly and proximately caused said injury and damage to the plaintiff:

"1. That the defendants carelessly and negligently caused their said motor vehicle to forcibly and violently run into and strike against said motor vehicle in which the plaintiff was then and there riding.

"2. That the defendants carelessly and negligently failed to give the right of way to the motor vehicle in which the plaintiff was then and there riding.

"3. That the defendants carelessly and negligently failed to keep their said motor vehicle under proper control.

"4. That the defendants carelessly and negligently caused their said motor vehicle to make a sudden left-hand turn without giving suitable, sufficient and proper notice, signal and warning.

"The defendants deny each and all of the foregoing alleged acts of negligence and omissions; deny that the plaintiff was in the exercise of

Donald V. Rice, so negligently drove and propelled with great force and violence into and against the said motor vehicle of the plaintiff, causing personal injuries to said plaintiff, whereby plaintiff sustained damage.

"The defendants, have filed their answer to said Complaint, whereby they deny the allegations of said complaint.

"It is upon the issues formed by the complaint and the answer as aforesaid, that this cause comes on for hearing and determination before the Court and jury."

Appellees' instruction number seventeen is as follows:

"The Court instructs the jury that the plaintiff cannot recover from the defendants herein unless and until he proves by the greater weight or preponderance of the evidence and under the instructions of the Court, each and all of the following propositions:

"First, that the plaintiff, Richard V. Kerrigan, just before and at the time of the occurrence in question, was using reasonable and ordinary care for his own safety, and

"Second, that the defendants were guilty of the negligence charged against them, and

"Third, that the negligence, if any, of the defendants was a proximate cause of the injuries complained of.

"If the plaintiff failed to prove any one of the foregoing propositions by the greater weight or preponderance of the evidence, he cannot recover from the defendants in this case."

Appellant's tendered instruction number two, refused by the Court, is as follows:

"2. The complaint alleges that the plaintiff was injured and sustained damage while exercising reasonable care for his own safety, and that the defendants were guilty of the following acts of negligence and omissions which directly and proximately caused said injury and damage to the plaintiff:

"1. That the defendants carelessly and negligently caused their said motor vehicle to forcibly and violently run into and strike against said motor vehicle in which the plaintiff was then and there riding.

"2. That the defendants carelessly and negligently failed to give the right of way to the motor vehicle in which the plaintiff was then and there riding.

"3. That the defendants carelessly and negligently failed to keep their said motor vehicle under proper control.

"4. That the defendants carelessly and negligently caused their said motor vehicle to make a modern left-hand turn without giving sufficient and proper notice, signal and warning.

"The defendants deny each and all of the foregoing alleged acts of negligence and omissions; deny that the plaintiff was in the exercise of

ordinary care for his own safety; deny that the plaintiff was injured or damaged as a proximate result of any negligence on the part of the defendants; and deny that the plaintiff is entitled to judgment in any sum whatsoever.

"These are the issues which you are to determine from the evidence and under the instructions of the Court."

The Court wrote on appellant's instruction number two, "Refused; covered." In this case there was a sharp conflict in the evidence and when such appears the law requires that the instructions given should state the law with accuracy and be free from error which might mislead the jury. (Rogers vs. Mason, 345 Ill. App. 560; Alexander vs. Sullivan, 334 Ill. App. 42.)

Appellees' instruction number seventeen which told the jury that the plaintiff could not recover unless he proved among other things "that the defendants were guilty of the negligence charged against them" is confusing because it does not tell the jury in this or other instructions what the negligence charged against them was. It is not cured by appellees' instruction number eleven because that instruction, while attempting to define the issues, wholly ignores all other charges of negligence in the complaint except the charge that the defendants negligently drove and propelled their motor vehicle against the motor vehicle of the plaintiff. In Rogers vs. Mason, above mentioned, the Court held in a lawsuit involving a motor vehicle collision that the giving of a similar instruction was reversible error. In that case, as here, the complaint alleged multiple acts of negligence. This instruction required the plaintiff to prove that the defendants were "guilty of the acts of negligence complained of before they can recover from him." As the Court said, this instruction required the plaintiff to prove all the acts of negligence before he could recover. The Court said that the jury was confused, if not wholly misguided, by the giving of this instruction. The Court commented also in the case that there was no instruction to the jury which outlined or explained the contents of the complaint or of the counterclaims. That is true in this case, although appellees' instruction number eleven did attempt to

ordinary care for his own safety; deny that the plaintiff was injured or damaged as a proximate result of any negligence on the part of the defendants; and deny that the plaintiff is entitled to judgment in any sum whatsoever.

"These are the issues which you are to determine from the evidence and under the instructions of the Court."

The Court wrote on appellant's instruction number two, "refused; covered." In this case there was a sharp conflict in the evidence and when such appears the law requires that the instructions given should state the law with accuracy and be free from error which might mislead the jury. (Rogers vs. Mason, 348 Ill. App. 560; Lexander vs. Building, 334 Ill. 192.)

Appellees' instruction number seventeen which told the jury that the plaintiff could not recover unless he proved among other things "that the defendants were guilty of the negligence charged against them" is confusing because it does not tell the jury in this or other instructions what the negligence charged against them was. It is not cured by appellees' instruction number eleven because that instruction, while attempting to define the issues, wholly ignores all other charges of negligence in the complaint except the charge that the defendants negligently drove and propelled their motor vehicle against the motor vehicle of the plaintiff. In Rogers vs. Mason, above mentioned, the Court held in a lawsuit involving a motor vehicle collision that the giving of a similar instruction was reversible error. In that case, as here, the complaint alleged multiple acts of negligence. This instruction required the plaintiff to prove that the defendants were "guilty of the acts of negligence complained of before they can recover from him." As the Court said, this instruction required the plaintiff to prove all the acts of negligence before he could recover. The Court held that the jury was confused, if not wholly misguided, by the giving of this instruction. The Court commented also in the case that there was no instruction to the jury which outlined or explained the contents of the complaint or of the counterclaim. That is true in this case, although appellees' instruction number eleven did attempt to

define the issues, it actually defined only one of the issues and ignored the other allegations of negligence charged in the complaint.

In our opinion instruction seventeen is further bad because it is peremptory in form and directs a verdict and therefore is not aided by other instructions but must stand or fall as a proper announcement of the law by its own language. The second clause of instruction seventeen does not define the charges of negligence. It merely states that the plaintiff could not recover unless the defendants "were guilty of the negligence charged against them." What negligence is meant? This is not stated.

The plaintiff was entitled to have the jury instructed briefly concerning the issues presented by the pleadings. (Fraider vs. Hannah, 338 Ill. App. 440; Murphy vs. King, 284 Ill. App. 74.) They are also entitled to have the jury instructed in such a manner as not to mislead them. Appellees rely heavily on the case of Bertrand vs. Adams, 344 Ill. App. 559. In that case the Court held that since there was but one principle issue involved, the failure of the instructions to define the issues did not mislead the jury. In the instant case the issues are joined on five specific charges of negligence and the evidence was in sharp conflict on several of them. The pleadings necessitated that the jury should be properly instructed as to the issues. This was not done. Under the facts in this case, we deem the giving of instructions eleven and seventeen reversible error.

That part of appellant's motion for a new trial referring to the instructions is as follows: "the instructions given to the jury on behalf of the defendants were erroneous." Appellees claim that this is not sufficient as the objections to instructions eleven and seventeen should have been more specific. This Court has said in Baker vs. Thompson, 337 Ill. App. 327, where a similar claim was urged and the language used in the motion for new trial was practically identical, that "appellee is entitled to have this assignment of error considered by this Court." (Citing cases.) This contention of the appellee is without merit.

define the issues, it actually defined only one of the issues and ignored the other allegations of negligence alleged in the complaint.

In our opinion instruction seventeen is further bad because it is peremptory in form and directs a verdict and therefore is not aided by other instructions but must stand or fall as a proper announcement of the law by its own language. The second clause of instruction seventeen does not define the charges of negligence. It merely states that the plaintiff could not recover unless the defendants "were guilty of the negligence charged against them." What negligence is meant? This is not stated.

The plaintiff was entitled to have the jury instructed briefly concerning the issues presented by the pleadings. (Parker vs. Hamm, 33 Ill. App. 180; Murphy vs. King, 28 Ill. App. 78.) They are also entitled to have the jury instructed in such a manner as not to mislead them. The law rely heavily on the case of Portland vs. Adams, 74 Ill. app. 599. In that case the Court held that since there was but one principle issue involved, the failure of the instructions to define the issues did not mislead the jury. In the instant case the issues are joined on five possible charges of negligence and the evidence was in sharp conflict on several of them. The pleadings necessitated that the jury should be properly instructed as to the issues. This was not done. Under the facts in this case, we deem the giving of instructions eleven and seventeen reversible error.

The part of appellee's motion for a new trial referring to the instructions is as follows: "The instructions given to the jury on behalf of the defendants were erroneous." Appellee claim that this is not sufficient as the objections to instructions eleven and seventeen should have been more specific. This Court has said in Baker vs. Thompson, 337 Ill. app. 327, where a similar claim was urged and the language used in the motion for new trial was practically identical, that "appellee is entitled to have this assignment of error considered by this Court." (Citing cases.) This contention of the appellee is without merit.

Appellees claim that appellant's assignment of error with reference to the failure of the Court to give appellant's instruction number two is waived. Appellant does not assign the refusal to give this instruction in his grounds for a new trial and he is precluded from raising it here.

In view of the foregoing it is not necessary to pass on appellant's claim that the verdict is against the manifest weight of the evidence.

For the reasons above announced it is our opinion that the plaintiff is entitled to a new trial.

Judgment reversed and remanded,

Appellee claim that appellant's statement of error with reference to the failure of the Court to give appellant's instruction number two is waived. Appellant does not sustain the request to give this instruction in his brief for a new trial and he is precluded from raising it here.

In view of the foregoing it is not necessary to pass on appellant's claim that the verdict is against the manifest weight of the evidence.

For the reasons stated herein it is our judgment that the judgment be affirmed in a new trial.

Judgment reversed and remanded.

Gen. No. 10624 Agenda No. 21

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952 350 I.A. 581

W. R. ALLENSWORTH, Plaintiff-Appellee,	)	Appeal from
vs.	)	Circuit Court,
DON ALLENSWORTH, Defendant-Appellant.	)	Knox County, Illinois

ANDERSON -- J.

On November 29, 1940, W. R. Allensworth, plaintiff-appellee, in the Circuit Court of Knox County, Illinois, obtained a judgment by confession for the sum of $1790.25 and costs against Don Allensworth, defendant-appellant. The judgment was based on a promissory note dated June 26, 1939, due one year after date, in which note the defendant was the maker and the plaintiff the payee. The execution and delivery of the note and the regularity of the proceedings whereby it was reduced to judgment are not controverted by the defendant. No proceedings were commenced to attempt to collect the judgment or to contest its validity until October 4, 1951. On this date the judgment was revived by scire facias after a hearing. At this hearing the defendant attempted to contest the revival of the judgment on the grounds hereinafter mentioned, and the court held that in this proceedings it had no legal right to determine whether or not the defendant had a defense to the obligation which had been reduced to judgment. On January 21, 1952, the defendant filed his motion asking that the judgment be opened and that he be given leave to

Gen. No. 10521 Agenda No. 21

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1952

W. R. ALLENSWORTH,	)	
	) Plaintiff-appellee,	) Appeal from
	)	)
vs.	)	) Circuit Court,
	)	)
DON ALLENSWORTH,	)	) Knox County, Illinois
	) Defendant-appellant.	)

MEMORANDUM OPINION

On November 22, 1940, W. R. Allensworth, plaintiff-appellee, in the Circuit Court of Knox County, Illinois, obtained a judgment by confession for the sum of $1720.25 and costs against Don Allensworth, defendant-appellant. The judgment was based on a promissory note dated June 26, 1939, due one year after date, in which note the defendant was the maker and the plaintiff the payee. The execution and delivery of the note and the regularity of the proceedings whereby it was reduced to judgment are not controverted by the defendant. No proceedings were commenced to attempt to collect the judgment or to contest its validity until October 1, 1951. On this date the judgment was revived by entry fourteen days after a hearing. At this hearing the defendant attempted to contest the revival of the judgment on the grounds hereinafter mentioned, and the court held that in this proceedings it had no legal right to determine whether or not the defendant had a defense to the obligation which had been reduced to judgment. On January 21, 1952, the defendant filed his motion asking that the judgment be opened and that he be given leave to

plead to the merits of the case. To this motion was attached the affidavit of the defendant in support of the motion. On February 4, 1952, the court denied the motion. The defendant shortly thereafter filed his second motion to set aside the first order. This motion was also supported by the affidavit of the defendant. The court denied this motion to reinstate the cause on February 13, 1952. In April, 1952, the defendant filed his third motion in which he asked the court to reopen the cause and permit him to plead. To this motion was also attached a lengthy affidavit in support thereof. On April 4, 1952, the court also denied this motion. The defendant has appealed from these orders.

The questions presented here and in the Circuit Court are: (1) Do the affidavits disclose a meritorious defense to the plaintiff's cause of action; and (2) has the defendant acted diligently and without laches.

Plaintiff contends that the defendant is barred by laches and lack of diligence from maintaining proceedings to open this judgment after more than ten years has elapsed. Supreme Court Rule 26 (Ill. Rev. Stat., 1951, ch. 110, par. 259.26) provides the manner in which judgments by confession may be opened. Under this rule, if the affidavits disclose that the defendant has a prima facie defense, then the judgment is opened and the defendant is given leave to interpose his defense and the case is then heard upon its merits on the pleadings. The rule further provides in order for the judgment to be opened, it must appear that the person desiring to open the judgment "has been diligent." This rule that the party seeking to open a judgment by confession must act diligently and be free from laches has been announced by the reviewing courts in many cases. In Sternberger vs. Wright, 239 Ill. App. 490, the judgment was taken by confession on April 14 and the motion to open the judgment filed on May 19. The court held that the judgment of the trial court finding that defendant was guilty of laches would not be disturbed. The court says on page 492 of the opinion:

> "A motion to open a judgment by confession and for leave to plead is analogous to a motion to vacate a judgment obtained by default, and

plead to the merits of the case. To this motion was attached the affidavit of the defendant in support of the motion. On February 4, 1952, the court denied the motion. The defendant shortly thereafter filed his second motion to set aside the first order. This motion was also supported by the affidavit of the defendant. The court denied this motion to reinstate the cause on February 13, 1952. In April, 1952, the defendant filed his third motion in which he asked the court to reopen the cause and permit him to plead. To this motion was also attached a lengthy affidavit in support thereof. On April 4, 1952, the court also denied this motion. The defendant has appealed from these orders.

The questions presented here and in the Circuit Court are: (1) Is the affidavit disclose a meritorious defense to the plaintiff's cause of action; and (2) Was the defendant acted diligently and without laches.

Plaintiff contends that the defendant is barred by laches and lack of diligence from maintaining proceedings to open this judgment after more than ten years has elapsed. Supreme Court Rule 25 (Ill. Rev. Stat., 1951, ch. 110, par. 59.26) provides the manner in which judgments by confession may be opened. Under this rule, if the affidavits disclose that the defendant has a prima facie defense, then the judgment is opened and the defendant is given leave to interpose his defense and the case is then heard upon its merits on the pleadings. The rule further provides in order for the judgment to be opened, it must appear that the person seeking to open the judgment "has been diligent." This rule that the party seeking to open a judgment by confession must act diligently and be free from laches has been announced by the reviewing courts in many cases. In Sterkenburg vs. Wright, 237 Ill. App. 190, the judgment was taken by confession on April 14, and the motion to open the judgment filed on May 12. The court held that the judgment of the trial court finding that defendant was guilty of laches would not be disturbed. The court says on page 192 of the opinion:

> "A motion to open a judgment by confession and for leave to plead, is analogous to a motion to vacate a judgment obtained by default, and

the rule as to laches in default cases is applicable. Kesner vs. Truax, 195 Ill. App. 285; Freeman vs. Counsell, 203 Ill. App. 333. A default will not be set aside although the defendant may show that he has a good defense, when it does not appear that he exercised proper diligence. Mendell vs. Kimball, 85 Ill. 582."

In Tyler vs. Ross, 215 Ill. App. 502, the court held that even if some equitable grounds appeared why the judgment should have been opened, that the fact that the defendant had slept for more than two years on his rights before filing his motion to open the judgment, would preclude him from asserting such rights. See also Merit Acceptance Corp. vs. Novak, 342 Ill. App. 325.

We have examined the affidavits attached to the motions. It is very difficult to understand what the defendant's claimed defenses are. It does appear from the affidavits that he knew the judgment had been entered for more than ten years. It is hard to see how he can claim that he has been diligent and has not slept on his rights if he had known this for many years. If the rule of laches has been applied for short periods of time, less than one year, we can see no reason why it should not be conclusively applied here. In the intervening time many things may have happened; witnesses to the transaction may have died or their memories have faded, and it would be unjust to the plaintiff to open up this judgment after so long a time. Regardless of the merits of the defenses, if any, as disclosed by the affidavits, the defendant has slept on his rights and is now barred from interposing any defenses to the judgment. It appears to us that if ever there was a case where the doctrine of laches should be applied, this is the one.

Most of the cases cited by the defendant are not in point in view of our opinion. Automatic Oil Heating Co. vs. Lee, 296 Ill. App. ~~268~~ 628, cited by the defendant, states a rule of law that generally speaking the question of meritorious defense is of more importance than the question of defendant's diligence or lack of it. In that case the judgment was entered on November 9, 1937 and the motion to open up the judgment for leave to defend was filed on

the rule as to laches in default cases is applicable. Kenner vs. Turner, 195 Ill. 4[illegible]; Freeman vs. Tunnell, 203 Ill. 4[illegible]. 333. A default will not be set aside although the defendant may show that he has a good defense, when it does not appear that he exercised proper diligence. Bandell vs. Winbell, 85 Ill. 582."

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We have examined the affidavits attached to the motions. It is very difficult to understand what the defendant's claimed defense are. It does appear from the affidavits that he knew the judgment had been entered for more than ten years. It is hard to see how he can claim that he has been diligent and has not slept on his rights if he had known this for many years. If the rule of laches has been applied for short periods of time, less than one year, we can see no reason why it should not be conclusively applied here. In the intervening time many things may have happened; witnesses to the transaction may have died or their memories have faded, and it would be unjust to the plaintiff to open up this judgment after so long a time. Regardless of the merits of the defense, if any, as disclosed by the affidavits, the defendant has slept on his rights and is now barred from interposing any defenses to the judgment. It appears to us that if ever there was a case where the doctrine of laches should be applied, this is the one.

Most of the cases cited by the defendant are not in point in view of our opinion. Automatic Oil Heating Co. vs. Lee, 296 Ill. pp. 6[illegible], cited by the defendant, states a rule of law that generally governing the question of meritorious defense is of more importance than the question of defendant's diligence or lack of it. In that case the judgment was entered on November 2, 1917 and the motion to open up the judgment for leave to defend was filed on

November 29, 1937. The court properly held that this short period of time did not constitute laches.

We took with the case a motion filed by plaintiff to dismiss the appeal. The grounds assigned in this motion are that the abstract does not comply with the rules of this court and that the appeal was not filed within the statutory period. In view of our opinion, this motion is denied.

We express no opinion as to the merits of the alleged defenses to the judgment but find the defendant is barred by lack of due diligence and laches from obtaining an opening up of the judgment and therefore being given leave to plead.

The judgment of the trial court was correct and its judgment is affirmed.

Judgment affirmed,

November 23, 1937. The court properly held that this short period of time did not constitute laches.

We look with the case a motion filed by plaintiff to dismiss the appeal. The grounds assigned in this motion are that the appellees have not complied with the rules of this court and that the appeal was not filed within the statutory period. In view of our opinion, this motion is denied.

We express no opinion as to the merits of the alleged defenses to the judgment but find the defendant is barred by laches of the diligence and laches from obtaining an opinion as of the judgment and therefore being given leave to plead.

The judgment of the trial court was reversed and its judgment is affirmed.

Judgment affirmed.

abstract only

3363 A

General No. 10628 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - - 350 I.A. 58

October Term, A.D. 1952

ADELINA WINTER, Plaintiff-Appellant, vs. JULIUS L. SCHALLER, as Administrator of the Estate of ABBIE SCHLESINGER, Deceased, PAULINE WINTER, ROSINA SCHMIDT, MARTHA ANTOINE, and ELISABETH PFEIFER, Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF La SALLE COUNTY.

Dove, P. J.

The original complaint in this case was filed on June 21, 1951, to which a motion to strike was sustained. Thereafter and on April 8, 1952, the complaint was amended by adding an additional paragraph thereto. As amended, it alleged that the plaintiff, Adelina Winter, is the only surviving child and the only surviving heir at law of Caroline Schlesinger and Philip G. Schlesinger, both deceased; that on March 6, 1900, Philip G. Schlesinger acquired title to a described one hundred and sixty acres of land in La Salle County, the consideration therefor having been furnished by his wife, Caroline Schlesinger, the mother of the plaintiff; that Caroline Schlesinger died intestate on January 5, 1909,

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- -

October Term, A.D. 1969

APPELLEE PLEADS:	
Plaintiff-Appellee,	
vs.	APPEAL FROM THE
Eugene L. Bennett, as Administrator of the Estate of John [illegible] Deceased, Fulton [illegible], Guido Lucent, Antonio Lucent and John [illegible] Fulton,	CIRCUIT COURT OF
	LAKE COUNTY.
Defendants-Appellees.	

Dove, J. J.

The original complaint in this case was filed on June 20, 1967, by which a notice to strike was initiated. Thereafter and on April 2, 1968, the complaint was amended to allege an additional remedy thereto. As amended, it alleged that the plaintiff, Adelia Fuller, is the only surviving child and the only surviving heir at law of Caroline Schlesinger and that the defendants, both deceased: that on March 8, 1959, Philip J. Schlesinger acquired title to a [illegible] and eight acres of land in Lake County, the conveyance thereof being from Lorraine [illegible] his wife, Caroline Schlesinger, the mother of the plaintiff; that Caroline Schlesinger died intestate on January 2, 1967,

leaving her surviving her husband, Philip G. Schlesinger, and her three minor children, the plaintiff, now Adelina Winter, Helena Schlesinger, thereafter Helena Schlesinger Zorn, and LeRoy Schlesinger, as her only heirs at law; that her estate was solvent and no administration was had thereon; that on April 6, 1910, the said Philip Schlesinger, then a widower, conveyed said land to his said three minor children, reserving to himself a life estate therein; that on October 20, 1910, Philip Schlesinger married Abbie Schlesinger, and they lived together as husband and wife until his death on March 13, 1948, and during all this time Philip Schlesinger collected the rents arising from said premises and appropriated said rents to his own use and represented to the plaintiff and to his other children that he was entitled to said rents. It was then alleged that the plaintiff and said other children never knew of their rights to said rents until May 5, 1951.

The complaint, as amended, then alleged that LeRoy Schlesinger died intestate on March 28, 1917, leaving his father, the said Philip G. Schlesinger, and his said sisters, Helena and Adelina, as his heirs; that Helena died intestate on May 17, 1941, leaving her husband, Harry Zorn, and her father, Philip Schlesinger, and her sister, Adelina Schlesinger, the plaintiff, as her only heirs; that no administration was ever had on the estate of either LeRoy or Helena Schlesinger; that in January, 1942, Philip G. Schlesinger entered upon certain transactions with the family culminating in a deed to the land described in the complaint from Harry Zorn to Adelina Winter and in a deed from Philip G. Schlesinger, Abbie Schlesinger, and Adelina Winter to Philip G. Schlesinger, and, finally, in a deed from Philip G. and Abbie Schlesinger to

leaving her surviving her husband, Philip G. Schlesinger, and her three minor children, the plaintiff, Joe Schlesinger, Helene Schlesinger, Gwendolyn Helene Schlesinger Stern, and Lenore Schlesinger, as her only heirs at law; that her estate was solvent and no administration was had thereon; that on April 5, 1910, the said Philip Schlesinger, then a widower, conveyed said land to his said three minor children, reserving to himself a life estate therein; that on October 20, 1910, Philip Schlesinger married Edith Schlesinger, and they lived together as husband and wife until his death on March 11, 1916, and during all this time Philip Schlesinger collected the rents arising from said premises and appropriated said rents to his own use and remuneration to the plaintiff and to his other children but to the exclusion of the defendant, who was then living, and the plaintiff and said other children never gave of their rights to said rents until May 5, 1921.

The complaint, as amended, then alleged that Lenore Schlesinger died intestate on March 22, 1921, leaving her father, the said Philip G. Schlesinger, and the said sisters, Helene and Edithe, as her heirs; that Helene died intestate on May 17, 1921, leaving her husband, Harry Corn, and her father, Philip Schlesinger, as her heirs; that Edithe Schlesinger, the plaintiff, is her only heir; that no administration was ever had on the estate of either Lenore or Helene Schlesinger; that in January, 1922, Philip G. Schlesinger entered upon certain transactions with the family culminating in a deed to the land described in the complaint from Harry Corn to Edithe Winter and in a deed from Philip G. Schlesinger, Edithe Schlesinger, and Edithe Winter to Philip G. Schlesinger, and, finally, in a deed from Philip G. and Edithe Schlesinger to

Adelina Winter; this deed, however, reserved a life estate to Philip G. Schlesinger and reserved one-half of the rents to Abbie Schlesinger for her life should she survive her husband, Philip G. Schlesinger; that Philip G. Schlesinger and Harry Zorn, at that time, held minor fractional interests in remainder of record in said premises by reason of the deaths of LeRoy and Helena Schlesinger; that the deed from Harry Zorn to Adelina Winter was based on cash consideration paid and that the release of said minor fractional interests of record by Philip G. Schlesinger was the consideration for the establishment of the partial life estate in Abbie Schlesinger; that contemporaneously with and as a part of the foregoing transactions, certain interests were likewise modified as to other premises having small relative value and forming no portion of the basis for the relief requested in this proceeding.

It was then alleged that Philip G. Schlesinger died testate March 13, 1948, leaving his entire estate to Abbie Schlesinger, his widow; that his estate has been fully administered, Adelina Winter, the plaintiff, having been executor thereof; that Abbie Schlesinger died intestate on August 21, 1950, leaving as her heirs the defendants, Pauline Winter, Rosina Schmidt, Martha Antoine, and Elisabeth Pfeifer, and that the defendant Julius Schaller is the administrator of her estate and that partial distribution of her estate has been made.

It was then alleged that at the time of the death of Caroline Schlesinger, on November 13, 1909, the plaintiff and the other children of Philip and Caroline Schlesinger resided with their father and continued to do so for more than four years thereafter; that said Philip G. Schlesinger was duly

appointed guardian of said children and served as such guardian until the death of LeRoy Schlesinger and until the said Adelina and Helena Schlesinger had become of age; that said guardianship was closed on May 5, 1917, but said real estate was not inventoried in the guardianship estate or referred to therein.

It was then alleged that Philip G. Schlesinger died owning about $20,000 in cash and securities which, under the terms of his will or under joint tenancy agreements, passed to his wife, Abbie Schlesinger, upon the death of Philip G. Schlesinger; that such cash and securities are traceable to and form the major portion of the estate of Abbie Schlesinger, deceased; that said Abbie Schlesinger was for over thirty years the beneficiary of the representation made by Philip G. Schlesinger to his children, including the plaintiff, to the effect that he, the said Philip, was entitled to the rents, issues, and profits of said land; that said cash and securities which so passed to said Abbie Schlesinger represent, in major part, the accumulated excess of said rents from said premises.

It was then alleged that the said Philip G. Schlesinger acquired no interest in or to said lands under the deed of March 6, 1900, but a resulting trust arose in favor of his wife, Caroline, who furnished and paid the consideration therefor; that Philip G. Schlesinger in fact conveyed nothing to his said children by his deed of April 26, 1910, but thereby took away from them a portion of that which was already theirs; that the tenor and effect of said deed of April 26, 1910, was that of misleading said minor children as to their rights, and that the plaintiff is entitled to an accounting of the rents of said lands from and after the death of her mother, Caroline

Schlesinger, on January 25, 1909; that upon such accounting, such portion of said rents as were the rightful share of the plaintiff should be decreed to her and that a trust should be impressed upon so much of the cash and securitities of the estate of Abbie Schlesinger as were derived from and through the estate of Philip G. Schlesinger, deceased, and to the extent that the same may be necessary for payment to the plaintiff of the amount so found to be due her.

The complaint as amended prayed that a resulting trust be declared in and to said lands as of March 6, 1900, in favor of the deceased mother of the plaintiff, Caroline Schlesinger; that an accounting be ordered for the purpose of determining the interest of the plaintiff in and to the rents of and from the said lands, and that a trust be impressed upon the cash and securities in the estate of Abbie Schlesinger, deceased, derived through or from the estate of Philip G. Schlesinger, deceased, for the purpose of paying such amounts as may be found due the plaintiff.

To this amended complaint, the defendants filed their motion to strike. Upon a hearing, this motion was sustained , and the plaintiff having elected to abide by her complaint as amended, a final order was entered dismissing the complaint as amended for want of equity. To reverse this decree, the plaintiff appeals.

The theory of counsel for appellant is that inasmuch as it appears from the allegations of the complaint as amended that the consideration for the conveyance made in 1900 to Philip G. Schlesinger was furnished by his wife Caroline, the husband,

indemnity, on January 20, 1920, that upon such conveyance, such portion of said trust as were the distributive shares of the plaintiff should be deemed to be and that a trust should be impressed upon such of the real and securities of the estate of Alice Indemnity as were derived from and through the estate of Philip O. Indemnity, deceased, and to the extent that the same was not necessary for payment in the plaintiff of the amounts so found to be due her.

The complaint as amended states that a resulting trust be declared in and to said lands as of March 6, 1920, in favor of the deceased sister of the plaintiff, Bertha Indemnity; that an accounting be ordered for the purpose of ascertaining the interest of the plaintiff in and to the rents of said land the said lands, and that a trust be impressed upon the said securities in the estate of Alice Indemnity, deceased, derived through or from the estate of Philip O. Indemnity, deceased, for the purpose of paying such amounts as may be found due the plaintiff.

To this amended complaint, the defendants filed their motion to dismiss. Upon a hearing, this motion was sustained, and the plaintiff, having elected to stand by her complaint as amended, a final order was entered dismissing the complaint as amended for want of equity. To reverse this order, the plaintiff appeals.

The theory on which counsel for appellant in this instance is supported from the allegations of the complaint as amended that the consideration for the conveyance made in 1920 to Philip O. Indemnity was furnished by his wife Caroline, the husband.

Philip, took no beneficial interest in the land but only the bare legal title thereto in trust for his wife; that upon the death of Caroline, the wife, in 1909, the plaintiff and her brother and sister became the beneficiaries of said trust and their father continued to hold the legal title in trust for their benefit; that prior to April, 1910, the father, Philip G. Schlesinger, was the legal guardian of plaintiff and of her brother and sister, and that he was so acting at the time he conveyed to his children the fee to the land in which he held a bare legal title and reserved a life estate therein to himself and his then wife, Abbie Schlesinger; that the effect of this conveyance was to take from the children of Philip G. Schlesinger and Caroline Schlesinger the fee to the land, which in equity was theirs under a resulting trust, and place the legal title in them subject to the life estate of their father and step-mother. Counsel contend that in collecting and appropriating the rents from this farm to his own use after 1909, Philip did so as trustee for his children and that upon his death these rents made up the bulk of his estate and came into the hands of Abbie Schlesinger, his wife, and upon her death these rents, conclude counsel, properly belong to the plaintiff and to the other heirs of Caroline Schlesinger, as it was Caroline Schlesinger's money which paid for the farm. In support of their contention, appellant calls to our attention Wright v. Wright, 242 Ill. 71, Peters v. Meyers, 408 Ill. 253, and Kane v. Johnson, 397 Ill. 112.

In Wright v. Wright, 242 Ill. 71, the court affirmed a decree of the circuit court of Jackson County finding that

Elizabeth Wright, the widow of Ellis Wright, deceased, was entitled to have conveyed to her the legal title to eighty acres of land, for which she furnished the consideration and which had been conveyed to her husband on August 1, 1867. It appeared that the premises had been occupied by Ellis and Elizabeth Wright as a homestead from the time the premises had been acquired until the death of Ellis Wright on September 30, 1907, and that Elizabeth continued to reside thereon after the death of her husband and so occupied the premises at the time of the hearing of the case in the Circuit Court. In the course of its opinion, the court said (p.79): "The evidence in this record satisfactorily shows that appellee furnished the entire purchase money for the land in controversy and that the deed was taken in the name of Ellis Wright, and since it is not necessary that the evidence should show anything in addition to these two facts in order to raise a resulting trust, it follows that the decree below directing the conveyance to appellee is free from error, unless appellant's contention that appellee is barred by laches can be sustained. In determining whether appellee should be deprived of a remedy in equity on account of the delay in bringing this suit, circumstances tending to explain or excuse such delay should be considered. It is to be noted in this connection that there was no adverse possession in her husband and the occupation of the premises was joint. The intimate relation between husband and wife, and in this case her inability to read and write and her confidence

Elizabeth Wright, the widow of Ellis Wright, deceased, was entitled to have conveyed to her the legal title to eight acres of land, for which she (through her administrator and wife) had been conveyed to her husband on August 1, 1827. It appeared that the premises had been occupied by Ellis and Elizabeth Wright as a homestead from the time the premises had been acquired until the death of Ellis Wright on September 20, 1837, and that Elizabeth continued to reside thereon after the death of her husband and he occupied the premises at the time of the hearing of the case in the Circuit Court. In the course of its opinion, the court said (p.72): "The evidence in this record satisfactorily shows that appellee furnished the entire purchase money for the land in controversy and that the deed was taken in the name of Ellis Wright, but since it is not proven or that the witnesses should show anything to establish to them the facts in order to raise a resulting trust, it follows that the decree being directing the conveyance to appellee is free from error. Counsel's contention that appellee is barred by laches can be considered. In determining whether appellee should be barred of a remedy in equity on account of the delay in bringing this suit, circumstances tending to mitigate or excuse such delay should be considered. It is to be noted in this connection that there has no adverse possession to the husband and the occupation of the premises was joint. The intimate relation between husband and wife, and in this case the inability to read and write was the conditions

in her husband's repeated promises to convey the title to her, are all proper to be considered in determining whether the defense of laches should be allowed to prevail. - - - We think that under the circumstances shown by this record appellee was not barred, by a mere lapse of time, from maintaining her cross-bill."

In Kane v. Johnson, 397 Ill. 112, it appeared that title to a lot in Chicago was conveyed on June 14, 1943, to Lucille Porter and Robert Johnson, who were cousins, as joint tenants; that the purchase price thereof was $3000.00, $1000.00 of which was furnished by Lucille Porter and the balance of the purchase price was financed by a loan secured by a mortgage on the lot, which mortgage was signed by Lucille Porter and by Robert Johnson. Subsequently, Lucille Porter and Thomas Kane were married and, thereafter, on August 24, 1944, Mrs. Kane died. The suit was instituted by the surviving husband of Mrs. Kane, who sought to have a resulting trust declared in his favor and for a finding that the defendant, Robert Johnson, held title to the property as trustee. The superior court of Cook County so decreed, and in affirming that decree, the Supreme Court said (p. 117): "In this case we have the language of the deed, which is sufficient to show an expressed intent to convey the property to defendant and Lucille Porter Kane in joint tenancy, while, on the other hand, the evidence of the transaction and the payment of the $1000 show that Lucille Porter Kane was the only one that was beneficially interested in the property. As the master found, there is nothing in the evidence to show that the

that the defendant contributed any part of the $1000. Under such facts, the expressed intent as shown by the deed must give way to the rule of equity which protects the party beneficially interested. The instant that the legal title was transferred to the two grantees, the resulting trust arose. Defendant held title as a trustee for the benefit of his cograntee and never became seized of a title with his cograntee which possessed all the essential elements of a joint tenancy. The unities of interest in the property were not the same. The fact that the deed purported to convey the property in joint tenancy, which would give the right of survivorship, would not prevent the application of the equitable principles which control the establishment of a resulting trust. The principles announced in Mauricau v. Haugen, 387 Ill. 186; Partridge v. Berliner, 325 Ill. 253, and Cogley v. Cogley, 338 Ill. 400, support the foregoing conclusion. A resulting trust which arises in favor of an ancestor at the time the property was purchased may be enforced by those who are beneficially interested in the estate as heirs-at-law. Niland v. Kennedy, 316 Ill. 253."

In Peters v. Meyers, 408 Ill. 253, it was held that where a wife acquired real estate with her own money and subsequently married and voluntarily conveyed the property so acquired by her to an intermediary who paid no money for the conveyance and who, the next day, conveyed the property to the wife and her husband as joint tenants, such voluntary conveyance does not create a resulting trust in favor of the wife or her heirs. The court cited and commented upon Kane v. Johnson, 397 Ill. 112, and Wright v. Wright, 242 Ill. 71, and, also, Mauricau v. Haugen, 387 Ill. 186.

that the defendant contributed any part of the $1000. Under such facts, the recorded tenant in common by the deed was give one to the wife or wholly within probable the more beneficially interested. The instant that the legal title was transferred to the two grantees, the resulting trust arose. Defendants held title as a trustee for the benefit of the complainant and never became entitled to a share with his co-grantee which possessed all the essential elements of a joint tenancy. The nature of interest in the property was not the same. The fact that the deed purported to convey the property in joint tenancy, which gives the right of survivorship, could not prevent the application of the equitable principles which govern the establishment of a resulting trust. The principle enunciated in Gundlach v. Hagen, 227 Ill. 168; Partridge v. Gardner, 263 Ill. 382; and Dolan v. Dolan, 288 Ill. 470, support the foregoing conclusion. A resulting trust which arises in favor of an absent or at the time the property was purchased may be enforced by those who are beneficially interested in the estate. Gilmore v. Hammond, 310 Ill. 590."

In Fiske v. Fiske, 408 Ill. 520, it was held that where a wife acquired real estate with her own money and subsequently married and voluntarily conveyed the property to husband by her so he intermediary who paid no money for the conveyance was one, the mere fact, vesting the property in the wife and her husband as joint tenants, such relationship conveyance does not create a resulting trust in favor of the wife or her heirs. The court cited and concurred upon Lane v. Jackson, 227 Ill. 112, and Ketcham v. Wright, 242 Ill. 72, and also Hopkins v. Hagen, 227 Ill. 164.

The facts in the instant case are clearly distinguishable from the facts in any of the cases relied upon by appellant. In the Wright case, the husband and wife occupied, as a homestead, the premises involved from the time they were acquired until the death of the husband, and the widow, after her husband's death, continued to live thereon and was living there at the time the suit was heard. The court also pointed out that the wife could neither read nor write and that the evidence disclosed that her husband had repeatedly promised to convey the land to her. In Kane v. Johnson, supra, and Peters v. Meyers, supra, the question of laches was not involved.

In the instant case, it appears that more than fifty-one years elapsed since the conveyance of March 6, 1900, was executed and the filing of the original complaint. The only excuse alleged in the complaint for this delay was that appellant "never knew, nor was she advised at any time, of her rights in and to the rents, issues and profits of and from said described lands until the 15th day of May, 1951." Appellant does not allege that she did not know that her mother had furnished the purchase price for the land but simply that she did not know of her rights to the rents thereof until shortly before she filed her complaint.

It is well settled that where a plaintiff seeks the enforcement of some right which has long lain dormant and fails to set forth any excuse for an earlier prosecution of the suit, the defense of laches on the part of the plaintiff may be set up by a motion to dismiss under our present practice. Kerfoot v. Billings, 160 Ill. 563, 573. In LeGout v. LeVieux, 338 Ill. 46,

The facts in the instant case are clearly distinguishable from the facts in any of the cases relied upon by appellant. In the instant case, the husband and wife acquired, as a tenant, the premises involved from the time they were acquired until the death of the husband, and the widow, after her husband's death, continued to live thereon and was living there at the time the suit was begun. The record also points out that the wife could neither read nor write and that the evidence disclosed that her husband had repeatedly promised to convey the land to her. In Kane v. Johnson, supra, and Peters v. Waters, supra, the question of laches was not involved.

In the instant case, it appears that more than fifty-one years elapsed since the conveyance of March 6, 1904, was executed and the filing of the original complaint. The only excuse alleged in the complaint for this delay was that appellant "never knew, nor was she advised at any time, of her rights in and to the realty, issues and profits of said from said husband lands until the 14th day of May, 1951." Appellant does not allege that she did not know that her mother had furnished the purchase price for the land but alleges that she did not know of her rights to the realty thereof until shortly before she filed her complaint.

It is well settled that where a plaintiff seeks the enforcement of some right which has long lain dormant and fails to set forth any excuse for an earlier prosecution of the suit, the laches or lapse on the part of the plaintiff may be set up as a bar to the action under our present pleading. Herbert v. Billings, 180 Ill. 288, 297. In Lucas v. Lawless, 298 Ill. 46,

at page 51, it is said: "When a court of equity is asked to lend its aid in the enforcement of a demand that has become stale there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience and reasonable diligence of the party seeking its relief are the elements that call a court of equity into activity, (citing cases) and the absence of any one of these elements is fatal to a recovery." In Simpson v. Manson, 345 Ill. 543, 556, the court said: "Laches is not excused by simply saying, 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. The test is not what the plaintiff knows, but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him." In Carlson v. Carlson, 409 Ill. 167, at page 173, it is said: "The doctrine of laches was created by courts to promote justice, and not to protect fraud and injury, and it is said to be founded upon the maxim that equity aids the vigilant, and not those who slumber on their rights. Laches consists of such neglect or omission to assert a right as, taken in conjunction with the lapse of time more or less great, and other circumstances causing prejudice to an adverse party, will operate as a bar in a court of equity. (citing cases) And the general principle of equity is that the one calling upon the court for relief must show reasonable diligence, and where this is absent, a court will not grant the relief, particularly where claims rest in parol and the lapse of time and frailty of human memory may cause the truth concerning the transactions to be lost or misrepresented. Korson v. Stathopulos, 334 Ill. 193."

at page 21, it is said: "When a court of equity is asked to lend its aid in the enforcement of a trust that has become stale there must be some cogent and weighty reasons presented why it has been permitted to become so. Good faith, conscience and reasonable diligence on the part seeking the relief are the elements that call a court of equity into activity, (citing cases) and the absence of any one of these elements is fatal to a recovery." In Bryant v. Wood, 242 Ill. 518, 520, the court said: "Laches is not excused or stayed merely, 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge of course is no excuse for a stale claim. The test is not what the plaintiff knows, but what he might have known by the use of the means of information within the reach (citing the Ill-inois) the law requires of him." In Harrison v. Chadwick, 239 Ill. 147, on page 152, it is said: "The doctrine of laches was created by courts in private justice, and not in wrongs done and injury, and it is said by the foremost men the maxim that equity aids the vigilant, and not those who slumber on their rights. Laches consists of such neglect or omission to assert a right as, taken in conjunction with the lapse of time more or less great, and other circumstances causing prejudice to an adverse party, will operate as a bar in a court of equity. (citing cases) And the general principle of equity is that the one calling upon the court for relief must show reasonable diligence, and where this is absent, a court will not grant the relief, particularly where prejudice results in proof and the lapse of time has rendered it easier for one seeking the court wrongfully to be lost or misconstrued. Kerson v. Chadwick, 239 Ill. 152."

The real estate in which appellant asks that a resulting trust be declared in favor of her deceased mother was acquired by appellant's father on March 6, 1900, and the cash and securities which appellant seeks to have impressed with a trust in her favor is alleged to have been acquired by appellant's step-mother from the estate of appellant's father and who is alleged to have come into possession of the rents and income from this real estate some forty-eight years before his death. There are none of the elements present inthis case which would warrant a court of equity to grant the relief prayed for, and the decree of the circuit court must be affirmed.

Decree affirmed.

The real estate in which worthless part = results-
ing funds be deposited in favor of Dr. Jonesed another par-
ensured to appellant's trustee on March 8, 1924, one the same
and according which conditions seems to have transpired with a
right in his favor is alleged to have been acquired by appellant's
alienation from the estate of appellant's father who had is
alleged to have been into possession of the land the income
from this real estate more than twenty years before the death.
There are some of the alleged property rights upon which could
maintain a court of equity to grant the relief sought for, and
the decree of the circuit court must be affirmed.

Decree affirmed.

3358

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

At The February Term, A. D. 1953.

Term No. 53-F-1.

350 I.A. 100

J. C. AUFFENBERG, Inc., A Corporation, Plaintiff-Appellee,	)	
vs.	)	Appeal from an Interlocutory Order of the Circuit Court of St. Clair County, Illinois.
LOCAL 604, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, a Voluntary Unincorporated Association,	)	
and	)	
JERRY W. TURNER, DALE FERRIS, GLENN SIX, JOSEPH MARTIN PEOPPING, NORMAN EUGENE DAVIS, EVERETT DETERDING, ROBERT BRUNE, WILLIAM COX, Defendants-Appellants.	)	

BARDENS, P. J.

This appeal is taken from an order granting a temporary injunction without notice and without bond. The injunction restrains the defendants from picketing the place of business of the plaintiff.

The verified complaint sets up that plaintiff is an Illinois Corporation in the business of selling new and used automobiles in the city of Belleville, Illinois; that defendant, Local 604, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, is an unincorporated association with headquarters in the city of St. Louis,

Missouri; that defendants Turner and Ferris and Six are officers of the Union; and that the other defendants are former or present employees of the plaintiff. The complaint further alleges that on July 16, 1952, plaintiff received a letter from defendant union requesting an appointment and that shortly after the letter was sent defendant Dale Ferris called upon the plaintiff and demanded that plaintiff recognize Local 604 as the bargaining agent for plaintiff's salesmen; that plaintiff was informed that if it recognized said union there would be no picketing; that plaintiff refused to recognize the union as bargaining agent because five of the seven salesmen of plaintiff stated to the plaintiff's representatives that they did not desire to become members of said union; that on August 1 the union filed its petition with the National Labor Relations Board asking it be certified as bargaining agent for all of plaintiff's salesmen and that the board set August 22, 1952, as the date for hearing; that on August 13 defendants caused plaintiff's place of business to be picketed, said pickets carrying umbrellas bearing the legend "Unfair to auto salesmen"; and that said picketing has continued and will continue unless enjoined. The complaint further alleges that the obvious purpose of the picketing is to force the plaintiff to recognize the union as bargaining agent for employer's salesmen and that such action would be a violation of the

Taft-Hartley Law; that as a result of the picketing the mechanics and filling station attendants, who are members of unions affiliated with the American Federation of Labor, employed by plaintiff, have refused to work because they refuse to cross the picket line; that various firms which supply plaintiff and various people having business dealings with the plaintiff, and past customers and prospective customers, have refused to cross said picket line; that no dispute exists between the plaintiff and its employees; and that plaintiff is ready and willing to determine the issues of representation in the manner provided by law for the determination thereof. Paragraphs 17 and 18 of the complaint are as follows:

> 17. That plaintiff, because of said coercive, irregular and unjustified picketing, has suffered, and in the future will suffer, great and irreparable financial loss, the extent of which it is impossible to calculate; that unless said unlawful picketing is enjoined and restrained by temporary writ of injunction by this Honorable Court, without notice and without bond, plaintiff will suffer irreparable damage.
>
> 18. That plaintiff has no adequate remedy at law; that said Local Union 604 is an unincorporated voluntary association, whose officers are non-residents of the State of Illinois, and that plaintiff, in order to recover damages, would be required to pursue its remedy in another jurisdiction; that the individual resident defendants are, according to plaintiff's information and belief,

> insolvent; that, in the interval, great and irreparable loss and damage would result to plaintiff's business; and that plaintiff, organized under the laws of the State of Illinois and entitled to the protection of said laws against irresponsible non-residents, would be forced to file suit in another jurisdiction against said Union defendant.

On appeal the defendants urge three grounds for the reversal of the order granting the temporary injunction, as follows:
(1) That it was error to grant the injunction without notice and bond. (2) That it was error to grant the injunction because the defendants' right to picket peacefully is protected by their constitutional right of free speech; and (3) that the National Labor Relations Board has exclusive jurisdiction over the subject matter involved and therefore the Circuit Court of St. Clair County was without jurisdiction.

We will take up the assignments of error in the inverse order. As to assignment number three, the complaint is without sufficient allegations for us to determine whether or not the plaintiff is engaged in interstate commerce and for this reason we are unable to pass upon this assignment of error and refrain from so doing.

As to the second contention, namely, the defendants' right to free speech, we have very recently expressed our views on this right and its bearing on the subject of peaceful picketing in the case of Bitzer Motor Co. vs. Local 604, _____ Ill.

App. _____, N. E. (2)_____. Since the order in this case must be reversed, it is unnecessary to discuss this question further at this time.

As to the alleged error of the court in granting the injunction without notice and without bond, it is our opinion that the lower court did commit error. We had occasion in Stensel vs. Yates, 342 Ill. App. 435, 96 N. E. (2), 813, to review the authorities concerning the power of courts to grant injunctions without notice and bond and we concluded, under the applicable statute, that two possible situations are contemplated, to-wit: (1) The facts must show that even a slight delay will cause damage or prejudice so that action must be taken immediately, or (2) that the giving of notice may defeat the purpose of the writ. We also held that the statement that "plaintiff will suffer irreparable damage" is a conclusion of law and of no force in the pleading unless it is supported by allegations of fact. In Skarpinski vs. Veterans of Foreign Wars, 343 Ill. App. 271, 98 N. E. (2) 858, the court said that "in the last analysis, to test the necessity for the issuance of an injunction without notice, the court must ask whether in the minutes or hours required to procure a defendant's appearance, defendant could and would do that which would seriously obstruct the court's power to deal justly and effectively with the issue in dispute."

Judging the complaint under the rules laid down in the cases cited, we find no sufficient statement of facts in the complaint that would justify the issuance of the injunction without notice and we find no facts stated upon which to base a finding that the injunction should be issued without bond.

The order of the lower court is reversed and the cause remanded with directions to vacate the order granting the temporary injunction and for such further proceedings as are consistent with this opinion.

Order reversed and cause remanded.

Culbertson and Scheineman, J.J. concur.

Publish abstract only.

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52031
IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October Term, 1952

350 I.A. 100

EARL INGRAM,	)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, ILLINOIS.
- vs. -	)	
RALPH TUCKER,	)	
Defendant-Appellee.	)	

Honorable R. W. Griffith, Presiding Judge

SCHEINEMAN, J.

The plaintiff, Earl Ingram, suffered severe injuries in an automobile collision while he was riding as guest in a car driven by defendant, Ralph Tucker; suit was filed charging the defendant with wilful and wanton misconduct, but the jury found him not guilty, and the court denied a motion for new trial.

On this appeal, plaintiff contends the verdict was against the manifest weight of the evidence, that the court improperly permitted a written statement by plaintiff (Defendant's Exhibit "1") to be read to the jury and taken to the jury room, also that the instructions were misleading and erroneous.

It is undisputed that defendant was driving his Buick with plaintiff as guest on route 460 west of Nashville, Illinois. The road at this place was comparatively new, it was straight and dry and wider than older pavements. The occurrence was in the afternoon of a bright and clear day. Defendant was driving west at a high rate of speed and overtaking a green car proceeding in the same direction. The green car swerved to the left lane, exposing to view another car coming from the west. This car, hereafter called the Ezell car, met and passed the green car with each in the wrong lane. The defendant, on his right side of the road, collided head-on with the Ezell car, causing plaintiff's injuries. The green car disappeared.

The precise rate of speed of defendant is disputed, though we deem it clear that he was driving at high speed. In view of the condition of the weather, the nature of the road, and the traffic and use of way, speed alone would hardly be evidence of wilful and wanton misconduct. Bartalucci vs. Fallett, 382 Ill., 168, 175.

However, plaintiff's evidence further showed that defendant's driver's license was restricted to driving while wearing glasses, which he was not doing.

On this subject the defendant testified that, as he was overtaking the green car, he observed it was a late model Ford with a Missouri license. When he was about 50 yards behind it he saw its stop lights go on,

then it swerved sharply to the left. He stated that he immediately saw the Ezell car coming toward him, saw both cars clearly, at approximately the same distance. He believed he tried to apply brakes and turned right, but the accident happened immediately. The credibility of this testimony was a question for the jury, and, if believed, it could overcome any possible inference based on his driver's license that he could not see without glasses objects as large as automobiles in broad daylight.

The driver of the Ezell car and his wife, who was riding with him, both testified as plaintiff's witnesses. With his own testimony, this gave plaintiff three occurrence witnesses, against defendant alone. However, the Ezells' testimony differed substantially from plaintiff's and in some respects tended to corroborate the defendant.

For example, plaintiff asserted that when the green car swerved, the Ezell car was visible in the wrong lane approaching half on and half off the pavement and that this occurred nearly a quarter of a mile ahead of defendant's Buick, so that defendant had ample time to observe and take action, which he failed to do for some time, until it was too late.

On the other hand, Mr. Ezell stated that he glanced at the passing green car, then looked ahead and saw the Buick, that the defendant, "came right to us and caught between us." Thus, he clearly implies that defendant was very close to the point of passing when

that occurred. Mrs. Ezell contradicted herself in some respects, but admitted that after the passing of the green car the collision occurred, "almost instantaneously." Testimony by witnesses who came on the scene after the collision does not materially affect the foregoing. We conclude the verdict was not contrary to the manifest weight of the evidence.

An investigation of the accident was made by a witness who informed the jury that he was acting for an insurance company which insured the defendant. He said he made inquiries of the plaintiff while he was in the hospital, went back to the office and prepared a written statement, returned to the hospital the next day where the plaintiff signed the statement. This document identified as Defendant's Exhibit "1" was admitted in evidence over objection and read to the jury. It contained statements not otherwise inquired into on the trial and also a statement that the defendant was not blamed for the accident, "there was nothing he could do about it."

It is an exception to the hearsay rule that statements by an adverse party made elsewhere, oral or written, may be introduced as substantive evidence, as admissions against interest, without previous questioning of the party. Berringer vs. Lackner, 331 Ill. App. 591, (Citing Wigmore on Evidence); Peterson vs. Mid-West Transfer Co., 344 Ill. App. 167; Kane vs. Wehner, 312 Ill. App., 391; Stump vs. Dudley, 285 Ill. App., 46, 47; Johnson vs. Peterson, 166 Ill. App. 404.

The following is the preferred accepted rule as to the admissibility of such a statement: Is the previous statement of the adverse party inconsistent with his claim on the trial? If so, it should be admitted even though it may contain opinions and conclusions which would be excluded if they came from a witness other than a party. Plaintiff's statement that there was nothing defendant could do to avoid the accident is clearly inconsistent with his claim on the trial that defendant was guilty of wilful and wanton misconduct. It was an admission against interest and, therefore, admissible. Wigmore on Evidence, Sec. 1053-C; Swaix vs. Oregon Motor Sales, (Oregon) 82 P. 2nd 1084, 118 A.L.R. 1225; Grodsky vs. Bag Co. 324, Mo. 1067, 26 S.W. 2nd 618; Johnson vs. Marshall, 241 Ill. App., 80.

Further objection is now made by appellant that the document was taken to the jury room. The trial court ruled that the document was equivalent to a deposition and denied defendant's request that it go to the jury room. The plaintiff did not deny his signature thereon, but did state that he cannot remember signing it, and that it was different from his usual signature. As part of his case a specimen signature was admitted for comparison. To permit the jury to compare the signatures, the court directed that all but the signature on the exhibit be blocked out and in this condition it should go to the jury room.

The original exhibit was certified to this court for inspection. It was covered with an ordinary sheet of stationery attached at the top and bottom and not at the sides. It was possible to read through the paper by holding the exhibit before a light.

The court's order was unobjectionable. The method of compliance was not objected to at the trial. Moreover, the last procedure before closing argument was to read the exhibit to the jurors so it was fresh in their minds. There is no basis to presume the jury used the exhibit for anything other than its intended purpose, or that it caused any prejudice to the plaintiff, and no reversible error appears in this circumstance. Avery vs. Moore, 133 Ill., 74; Fein vs. Covenant Ass'n., 60 Ill. App. 274, 276.

Three peremptory instructions given at the request of defendant contained faulty syntax of this general type: "To recover from defendant, plaintiff must prove he was guilty of wilful and wanton misconduct." Obviously, the pronoun, "he," is ambiguous and the nearest apparent antecedent is the word, "plaintiff," This is a common error in every-day English, but causes no actual difficulty where the meaning is clear from what has gone before. Since these instructions came after the jury had heard all the evidence and the arguments, we deem it inconceivable that any juror would derive a meaning that plaintiff had to prove himself guilty of wrong conduct. The error appears

in various forms, but none of them could actually be confusing.

"The test is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions." Reivitz vs. Chicago Rapid Transit Company, 327 Ill., 207, 213. Accordingly, the grammatical errors must be held harmless.

Complaint is also made that the instructions did not correctly define wilful and wanton misconduct. We find the instructions in this case define such conduct in compliance with the definitions announced by the Illinois Supreme Court in a number of cases, such as Bartellucci vs. Falleti, 382 Ill., 168, 174; Clarke vs. Storchak, 384 Ill., 564; and Mower vs. Williams, 402 Ill., 486, 490.

In some of the prior decisions the Supreme Court added an example clause in substantially these words: "Such as a failure, after knowledge of impending danger, to exercise care to prevent it, or a failure to discover it through recklessness or carelessness when it could have been discovered by the exercise of ordinary care." Schneiderman vs. Interstate Lines, 394 Ill., 569, 583; Brown vs. Illinois Terminal R.R., 319 Ill., 326, 331. In view of this usage, this court, in Levanti v. Dorris, 343 Ill. App. 355 360, declined to reverse a case where such instruction was used,

but expressly stated a preference for the other form of definition, in these words:

"We do not regard the instruction as a model to be followed in like cases in that it uses an example or illustration to explain the meaning of a previous phrase. For purposes of instruction to juries, the definition given in Clarke vs. Storchak, supra, and Mower vs. Williams, 402 Ill., 486, 490, is preferable."

The instructions given in this case comply with the foregoing recommendation and cannot be held error.

At the request of defendant, the jury was instructed that plaintiff could not recover unless he proved by a preponderance of the evidence "that the defendant was guilty of wilful or wanton misconduct in one or more of the respects charged in the plaintiff's complaint." There was no instruction stating or summarizing the charges in the complaint, hence, plaintiff contends the giving of this instruction was error.

The instruction correctly states the law but this form has been criticized on the ground it refers the jury to the pleadings which are not submitted to them. The criticism involves the assumption that the jury goes clear through the trial without knowing what plaintiff has charged against defendant, until the court reads instructions. In the case before us, we regard such a presumption as incredible, and, under such conditions we decline to hold the reference to the complaint is reversible error. Bertrand v. Adams, 344 Ill. App. 559, 565.

The court also gave an instruction which assumed that Defendant's Exhibit 1 was signed by plaintiff, and this is assigned as error on the ground the court assumed a disputed fact. The record does not sustain the claim that the signature is disputed. When the document was first shown to plaintiff he stated without equivocation that it bore his signature on page 2, although he added that he did not remember signing it. He further stated that he did not usually sign his name in that way, but that it was his handwriting. Later he offered evidence of his physical and mental condition on the date the statement was given, but at no time did he deny the document bore his signature. The objection cannot be sustained.

The instructions and the court's ruling on the motion for new trial were correct, and the judgment for defendant is affirmed.

Judgment Affirmed.

Bardens, P. J. and Culbertson, J. concur.

Publish Abstract only.

164 A

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350 I.A. 101

STATES DEVELOPMENT AND MANUFACTURING COMPANY, a corporation, and GILBERT G. SCUDDER, Appellants,	APPEAL FROM
v.	SUPERIOR COURT,
WARSHAWSKY AND COMPANY, INC., a corporation, et al., Defendants below.	COOK COUNTY.
WARSHAWSKY AND COMPANY, INC., a corporation, Defendant and Cross-Complainant, Appellant,	
LAVIN ROOFING COMPANY, a corporation, Defendant and Cross-Defendant, Appellee.	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit against defendants Warshawsky and Company, Inc., Nellie Warshawsky, and Lavin Roofing Company in joint and several counts for property damage. From an order sustaining a motion to dismiss Lavin Roofing Company as party defendant on the pleadings, plaintiffs and cross-complainant Warshawsky and Company, Inc. appeal.

The amended complaint charges substantially that Nellie Warshawsky owns the record title to the premises located at 11-15 West Cullerton street, Chicago, Illinois; that plaintiff States Development and Manufacturing Company executed a lease with defendant Warshawsky and Company for a portion of the premises and was occupying the same on September 16, 1949; that it was the duty of Warshawsky and Company and Nellie Warshawsky to use

proper care in maintaining the roof of said building, which duty was disregarded, permitting the roof to become decayed, rotted and worn; that in the latter part of August, 1949 Warshawsky and Company retained the Lavin Roofing Company to repair the roof and that the Lavin Roofing Company did repair it; that it was the duty of Lavin Roofing Company to make a reasonable inspection to ascertain defects, if any, in the roof before loading it with additional weight of covering, to exercise reasonable care to ascertain that the roof's supports were in safe condition to permit additional roofing covering; that defendant Lavin Roofing Company could and should have known that the roof supports were weak and defective and that it could and should have discovered such defects; that Lavin Roofing Company, not regarding its duty, negligently overloaded the roof with the weight of additional covering when it knew or should have known that the roof's supports were weak and defective and could not support the additional covering; that as a direct result of the carelessness of the defendants on September 16, 1949, while the plaintiffs were using due care and diligence for their own safety, the roof caved in and destroyed various articles of property of the plaintiff States Development and Manufacturing Company, also causing termination of said plaintiff's business operation and loss of profits; that the automobile of plaintiff Scudder, an employee of States Development and Manufacturing Company, was demolished by the cave-in.

There are additional several counts against defendants which we consider it unnecessary to review.

Defendant Warshawsky and Company filed a cross-claim against the Lavin Roofing Company alleging in substance that on August 30, 1949 the Lavin Roofing Company contracted with Warshawsky and Company to make certain repairs on the roof in question; that the damage to plaintiffs' property was due solely to the negligence of Lavin Roofing Company, and that the latter was guilty of the following specific acts of negligence: (a) negligently and carelessly failed to perform the repairs on the roof; (b) negligently and carelessly failed to ascertain whether the roof supports were sufficiently strong to withhold the weight of the covering before proceeding; (c) negligently and carelessly provided a recovering of the roof with certain materials, to-wit: stone and tar which the cross-defendant knew or in the exercise of reasonable care, should have known were of greater weight than the roof supports would bear; (d) negligently and carelessly failed to inspect the joists and supporting beams prior to recovering the same with materials of great weight.

Cross-complainant further asked that in the event the plaintiffs recover judgment against the defendant and cross-claimant, Warshawsky & Company, Inc., the defendant and cross-defendant, Lavin Roofing Company, be held liable over to the cross-claimant for the whole amount of such recovery.

Lavin Roofing Company filed motions to dismiss the amended complaint and cross-complaint upon the grounds that plaintiffs failed to state any contractual relationship or privity between it and the plaintiffs; that the law does not place a duty on the said defendant to ascertain that the supports of the roof were in safe condition; that the defendant was under no duty to make a reasonable inspection to ascertain defects in the roof before loading it with additional weight; that the plaintiffs failed to state what the additional weight was and what the coverings consisted of. It was on these motions that the complaint as to the Lavin Roofing Company and the cross-complaint were stricken.

While it is true that the pleadings here indicate that Lavin Roofing Company was an independent contractor employed by defendant Warshawsky and Company and that there was no privity of contract between Lavin Roofing Company and plaintiffs, the established rule in this State is that lack of contractual relationship is not a defense to an action brought by a person not a party to a contract against an independent contractor, where the structure or subject matter of the contract is to be used for a particular purpose requiring security, safety and protection of the life and property of others. In Colbert v. Holland Furnace Co., 333 Ill. 78, a furnace had been installed by the defendant company and had been accepted by the property owner. A year after its installation the wife of the owner, while

working in her kitchen, stepped upon a cold air grating which gave way causing her leg to go into the aperture thus created and injuring her. In affirming a judgment for plaintiff our Supreme Court said (pp. 80-83):

> "Defendant in error did not sign the contract and is not mentioned therein and cannot be regarded as a privy to the contract. In view of the contractual relation between Colbert and plaintiff in error, the latter invokes the general rule that 'where an independent contractor is employed to construct and install any given work or instrumentality and has done the same and it has been accepted by the employer and the contractor discharged, he is no longer liable to third persons for injuries received as a result of defective construction or installation.' That this is the general rule is not questioned. The rule, however, has several exceptions, and the question to be here determined is whether, under the facts as shown by the evidence in this case, it comes within any of such exceptions. One of the well recognized exceptions to the rule is, that one who supplies a thing for such use by others that it is obvious that any defect will be likely to result in injury to those so using it is liable to any person who, using it properly for the purpose for which it is supplied, is injured by its defective condition. * * * This cold air grating, which was a part of the subject matter of the contract between Colbert and plaintiff in error, was to be used for a particular purpose requiring security for the protection of human life, and it was, therefore, an exception to the general rule that no liability exists against a contractor of work in favor of one injured by a defect therein after the work has been turned over to and accepted by the owner."

To the same effect is the late case of <u>Carson v. Western Hotel Corp.</u>, 342 Ill. App. 602.

The roof here was an instrumentality used for a particular purpose requiring security for the protection of human life. If a roof is improperly maintained or if, as under the allegations here, it is weighted with a load in excess of what its supports will maintain, it becomes a menace to life and property of all beneath its confines.

It is not surprising that no authority is cited in support of the premise urged by defendant Lavin Roofing Company that a roofing contractor employed to furnish a roof covering incurs no obligation to investigate or inspect building supports before proceeding to load the roof with additional weight. Much analogous reasoning to the contrary may be brought to bear. In MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, the defendant, an automobile manufacturer, sold an automobile to a retail dealer who in turn resold to the plaintiff. The plaintiff was injured as the result of a defective wheel. There was evidence that the defect could have been discovered on reasonable inspection. The court said:

> "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

In Retche v. Buick Motor Co., 358 Ill. 507, where the MacPherson case was cited with approval, the court said (p. 514):

> "The nature of an automobile gives warning of probable danger if its construction is defective; and hence, under the rule established by the later cases, the manufacturer of automobiles is liable to a purchaser from a dealer in its cars for its failure to exercise ordinary care in inspecting the wheels, brakes or other parts of the car so purchased * * *."

In Lill v. Murphy Door Bed Co., 290 Ill. App. 328, plaintiff was injured when a door bed collapsed. Plaintiff

alleged that defendant sold and installed a defective bed. Defendant contended that it owed no duty to plaintiff to exercise any care whatsoever on the sale or installation of the bed because no privity of contract existed between plaintiff and defendant. The court said (p. 342):

> "We think the rule in this State is that when an article is constructed by a manufacturer for others and, by reason of negligence, uses defective material or fails to use ordinary care in testing and inspecting the article after it is manufactured and before it is put into use and by reason thereof persons using the same are likely or liable to be injured, * * * such manufacturer is liable to such person who suffers injury, through such negligence, while using such article in a proper manner."

While the offending instrumentality here is not a manufactured product such as those devices considered in the above cases, the necessity of inspection arises out of the same underlying principles.

We are of the opinion that the allegations of the amended complaint charging negligence against the defendant Lavin Roofing Company were erroneously stricken.

With reference to the counterclaim the allegations against Lavin Roofing Company are substantially the same as the allegations contained in the amended complaint. However, in some instances they contain additional and more specific charges of negligence, and we are of the opinion that the defendant Warshawsky and Company should have the advantage of every defense which might be brought by the complainant against its codefendant. Accordingly it was error to strike the first six paragraphs of this counterclaim.

Paragraph seven of the counterclaim is as follows: "That in the event the plaintiffs recover judgment against the defendant and cross claimant, Warshawsky & Company, Inc., the defendant and cross defendant, Lavin Roofing Company, will be liable over to the cross claimant for the whole amount of such recovery." This paragraph is extremely vague in that it merely suggests that a judgment be entered against the cross-defendant in the event that a jury finds Warshawsky and Company guilty. We are of the opinion that it would not be expedient or feasible for the trial court to attempt to give the jury any such conditional instruction, as would be required to meet the suggestion.

The judgment order is affirmed in part and reversed in part and the cause remanded with directions to proceed in conformity with the views herein expressed.

Affirmed in part; reversed in part
and remanded with directions.

Robson, P. J., and Schwartz, J., concur.

3403 A

Abstract

Gen. No. 10660 Agenda No. 9

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1953

350 I.A. 102

LOUIS J. MEYER, Plaintiff-Appellee, vs. BERTHA R. KRAMER, ANNA MARIE MADDEN, the unknown heirs and devisees of Patrick J. Carlin, deceased, JAMES DORAN, ELSIE DORAN, LEAH LEWIS, ROBERT J. DEVINE, HECTOR DROLET, VICTOR N. BOUDREAU, successor trustee, unknown heirs and devisees of John G. Kramer, deceased, the unknown owner or owners of the S½ of Lot 9 in Block 24, in the Original Town of Kankakee, now City of Kankakee, County of Kankakee and State of Illinois, Defendants-Appellants.	Appeal from Circuit Court Kankakee County

ANDERSON -- J.

This is an appeal by Bertha R. Kramer, defendant-appellant, from a decree of foreclosure entered by the Circuit Court of Kankakee County, in favor of Louis J. Meyer, plaintiff-appellee. The complaint alleged that the plaintiff was the owner of a trust deed on the real estate involved and that the defendant, Bertha R. Kramer, who had assumed and agreed to pay the same, had failed to make the payments. A decree of foreclosure was prayed to satisfy the indebtedness.

The complaint further alleged that the defendant, Bertha R. Kramer, and her husband, John J. Kramer, now deceased, since the date of the trust deed and continuing until the year 1951, had made various payments on the indebtedness amounting to $7324.06 and that after credit had been given for such payments, there remained due on the mortgage $37,260.47. The alleged

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1951

LOUIS G. MEYER, Plaintiff-appellee,	
vs.	
BERTHA E. EVANS, ANNA MAY [illegible], the unknown heirs and devisees of Patrick G. Carlin, deceased, [illegible], [illegible], LEAH [illegible], ROBERT L. [illegible], Victor [illegible], VICTOR E. [illegible], successor trustee, unknown heirs and devisees of John G. Evans, deceased, the unknown owner or owners of the [illegible] of lot 9 in block [illegible], in the Original Town of Kankakee, now City of Kankakee, County of Kankakee and state of Illinois, Defendants-appellants.	Appeal from Circuit Court Kankakee County

MEMORANDUM -- 6.

This is an appeal by Bertha E. Evans, defendant-appellant, from a decree of foreclosure entered by the Circuit Court of Kankakee County, in favor of Louis G. Meyer, plaintiff-appellee. The complaint alleged that the plaintiff was the owner of a trust deed on the real estate involved and that the defendant, Bertha E. Evans, who had assumed and agreed to pay the same, had failed to make the payments. A decree of foreclosure was prayed to satisfy the indebtedness.

The complaint further alleges that the defendant, Bertha E. Evans, and her husband, John G. Evans, now deceased, since the date of the trust deed and continuing until the year 1951, had made various payments on the indebtedness amounting to $7[illegible].00 and that after credit had been given for such payments, there remained due on the mortgage $1[illegible],[illegible].07. The alleged

payments consisted of purchases of merchandise from a store operated by the Kramers on the premises. The defendant, Bertha R. Kramer, answered the complaint and stated that the claim of the plaintiff was barred by the Statute of Limitations.

Evidence was heard by the Chancellor who found the issues in favor of the plaintiff and entered a decree of foreclosure for the amount claimed by the plaintiff.

The first question involved before the Chancellor and here is whether or not the defendant, Bertha R. Kramer, established a defense that the debt is barred by the Statute of Limitations.

The second question involved is whether or not the plaintiff proved the payments sufficient to toll the running of the Statute of Limitations.

The principal questions before this court are whether or not the Chancellor's findings that Bertha R. Kramer, defendant, had not established her defense of the Statute of Limitations and the plaintiff had established the payments sufficient to toll the Statute, were contrary to the law and against the manifest weight of the evidence.

Bertha R. Kramer assigns as error that the decree was contrary to the law and the evidence, that certain incompetent evidence was improperly admitted on behalf of the plaintiff, and that the Chancellor improperly refused to strike certain testimony of the plaintiff.

The evidence discloses that in 1927 John J. and Bertha R. Kramer assumed and agreed to pay certain mortgage indebtedness arising from the purchase of the real estate described in the complaint, said indebtedness being evidenced by a ~~trust deed~~ principal note and interest coupon notes. The first coupons were paid promptly as they came due. In 1932 it appears that the interest coupons were not paid, due to the general depression. Plaintiff testified that he demanded payment but the Kramers stated that they were unable to pay, and thereafter plaintiff stated to the Kramers that he and his family would be willing to buy merchandise from their clothing store and apply it on

[illegible] contains of [illegible] of [illegible] from a [illegible] [illegible] by the [illegible] on the [illegible]. The defendant, [illegible] [illegible], [illegible] the complaint and stated that the claim of the plaintiff was barred by the statute of limitations.

Evidence was heard by the chancellor and [illegible] in favor of the plaintiff and entered a decree of foreclosure for the amount claimed by the plaintiff.

The first question involved before the chancellor was [illegible] whether or not the defendant, [illegible] [illegible], [illegible] a defense that the debt is barred by the statute of limitations.

The second question involved is whether or not the plaintiff proved the payments sufficient to toll the running of the statute of limitations.

The principal questions before this court are whether or not the plaintiff's [illegible] and [illegible] [illegible], however, [illegible] [illegible] [illegible] of the statute of limitations and the plaintiff has established the payments sufficient to toll the statute, were contrary to the law and against the manifest weight of the evidence.

[illegible] [illegible] [illegible] error that the [illegible] [illegible] contrary to the law and the evidence, that certain [illegible] [illegible] improperly admitted on behalf of the plaintiff, and that the chancellor improperly refused to strike certain testimony of the plaintiff.

The evidence discloses that on [illegible], [illegible] [illegible] [illegible] [illegible] agreed to pay certain mortgage indebtedness arising from the purchase of the real estate mentioned in the complaint, said indebtedness being evidenced by a promissory note and interest coupons. The first coupons were paid promptly as they came due. In 1931 it appears that the interest coupons were not paid, due to the general depression. Plaintiff testified that he demanded payment but the [illegible] stated that they were unable to pay, and thereafter plaintiff stated to the [illegible] [illegible] and his family would be willing to buy sufficiently [illegible] [illegible] [illegible] [illegible] [illegible]

the indebtedness. They agreed to this. Mrs. Kramer denies the conversations and states that at that time plaintiff had a charge account at their store and purchases made in 1932 and thereafter were merely a continuation of the said charge account.

Mr. Kramer died March 1, 1947. At the time of his death, plaintiff and the members of his family had obtained merchandise in the amount of $6134.41. Plaintiff testified that the summer after Mr. Kramer's death, plaintiff went to the store and demanded his money, and at that time the loan and amount due ~~was~~ were discussed. Mrs. Kramer stated that at that time she told plaintiff that she had overpaid him and that she could not pay the loan. Plaintiff and the members of his family continued to obtain merchandise from the store until the spring of 1951.

It appears from the evidence that when the Kramers sold merchandise to the plaintiff or members of his family, a sales slip was given to them and a charge was made against them on the books. Plaintiff testified that he kept the sales slips but made no endorsement on the notes or coupons.

Plaintiff's son testified that after Christmas in 1932 he was present at a conversation with the Kramers when they stated that they would never be able to pay in cash and that the plaintiff would have to take it out in merchandise. He stated that after Mr. Kramer's death he had another conversation with Mrs. Kramer, at which time she stated that her husband had left nothing but debts and that the plaintiff would have to be paid in merchandise. Mrs. Kramer denied the testimony of the plaintiff and his son.

There were over 300 transactions by the plaintiff to obtain merchandise from the defendant Kramer's store. Mrs. Kramer claimed that the items of merchandise purchased by the plaintiffs were merely on open account and did not constitute any payment on the indebtedness owed by the Kramers to the plaintiff, that at no time was there any conversation between the Kramers and the plaintiff or his son to the effect that the merchandise charges might be credited on the mortgage, that at all times they expected to be

the transaction. They agreed to this. Mrs. Kramer during the conversations and stated that he had also plaintiff had a charge account at their store and purchases made in 1932 and therefore was entitled a certification of the said charge account.

Mr. Kramer died March 1, 1933. At the time of his death, plaintiff and the members of his family had obtained merchandise in the amount of $[illegible]. Plaintiff testifies that the owner also Mr. Kramer's widow, plaintiff was to the store and demanded his money, and at that time the loan and account due was discussed. Mrs. Kramer stated that at that time she told plaintiff that she had overpaid his and that she would not pay the loan. Plaintiff and the members of his family continued to obtain merchandise from the store until the spring of 1934.

It appears from the evidence that when the Kramers sold merchandise to the plaintiff or members of his family, a sales slip was given to them and a charge was made against them on the books. Plaintiff testified that he kept the sales slips but made no memorandum of the notes or loans.

Plaintiff's son testified that after Christmas in 1932 he was present at a conversation with the Kramers when they stated that they would never be able to pay in cash and that the plaintiff would have to take it out in merchandise. He stated that after Mr. Kramer's death he had another conversation with Mrs. Kramer, at which time she stated that her husband had left nothing but debts and that the plaintiff would have to be paid in merchandise. Mrs. Kramer denied the testimony of the plaintiff and his son.

There were over 300 transactions by the plaintiff to obtain merchandise from the defendant Kramer's store. Mrs. Kramer claimed that the items of merchandise purchased by the plaintiff were merely on open account and did not constitute any payment on the indebtedness owed by the Kramers to the plaintiff, that at no time was there any conversation between the Kramers and the plaintiff or his son to the effect that the merchandise charges might be credited on the mortgage, that at all times they expected to be

paid for the merchandise, and that she and Mr. Kramer made attempts to collect the account from the plaintiff but made no attempt other than to speak to him about it.

Mrs. Kramer as executrix of her husband's estate did not inventory the claimed item of indebtedness and testified that she did not prepare the inventory but merely signed it.

First considering the assignment of error of defendant Kramer with respect to the testimony of the plaintiff's son, it is apparent that his testimony was admissible as a statement by Bertha R. Kramer against interest, and the trial court properly denied the motion to strike said testimony. (Peterson vs. Midwest Trans. Co., 344 Ill. App. 167.)

It is agreed by the parties hereto that payment on a note need not be made in money in order to toll the running of the Statute of Limitations.

The law has long been established in this State that a payment or promise of payment sufficient to toll the Statute of Limitations need not be in writing but may be established by parol evidence. (Joseph vs. Carter, 314 Ill. App. 630.)

The Statute of Limitations is an affirmative defense and the burden of proof that the action is barred is upon the party pleading the Statute. (Joseph vs. Carter, supra.)

Part payment will toll the Statute of Limitations if made under such circumstances that a promise to pay may be reasonably inferred from it, but where the instrument on its face is outlawed by limitations, the holder thereof must prove that payments had been made under such circumstances as would indicate the intention to pay the full amount. (Wright vs. Stinger, 269 Ill. App. 224.)

The Chancellor found that the plaintiff had proved by a preponderance of the evidence that the purchases of merchandise and delivery thereof constituted part payment. The Chancellor further found that such part payments, made under such circumstances, indicated an intention on the part of the Kramers before the death of Mr. Kramer and of Mrs. Kramer as executrix after

paid for the merchandise, and that she and Mr. Kramer made efforts to collect the account from the plaintiff but made no attempt other than to speak to him about it.

Mrs. Kramer as executrix of her husband's estate did not inventory the claimed item of indebtedness and testified that she did not prepare the inventory but merely signed it.

After considering the assignment of error of defendant Kramer with respect to the testimony of the plaintiff's son, it is apparent that his testimony was admissible as a statement by bailee n. Kramer against interest, and the trial court properly denied the motion to strike said testimony. (Peterson vs. Midwest Trans. Co., 241 Ill. App. 167.)

It is argued by the petitioe hereto that payment on a note need not be made in money in order to toll the running of the statute of limitations.

The law has long been established in this state that a payment sufficient to toll the statute of limitations need not be in writing but may be established by parol evidence. (Joseph vs. Carter, 211 Ill. App. 630.)

The statute of limitations is an affirmative defense and the burden of proof that the action is barred is upon the party pleading the statute. (Joseph vs. Carter, supra.)

Part payment will toll the statute of limitations if made under such circumstances that a promise to pay may be reasonably inferred from it, but where the instrument on its face is outlawed by limitations, the holder thereof must prove that payments had been made under such circumstances as would indicate the intention to pay the full amount. (Wright vs. Stinger, 249 Ill. App. 224.)

The Chancellor found that the plaintiff had proved by a preponderance of the evidence that the purchase of merchandise and delivery thereof constituted part payment. The Chancellor further found that such part payments made under circumstances, indicated an intention on the part of the Kramers before the death of Mr. Kramer and of Mrs. Kramer as executrix after

his death to pay the full amount. The Chancellor found that after Bertha Kramer's proof of the bar of the Statute of Limitations, the plaintiff had sustained the affirmative of the issue and had proved by a preponderance of the evidence that the Statute had been tolled.

It appears from the evidence and the briefs of counsel that there is no dispute either as to the amount of the mortgage debt or as to the value of the merchandise purchased by the plaintiffs at the Kramer's store.

As previously pointed out there were over 300 transactions in obtaining merchandise from the store running from 1932 to 1951. The Chancellor heard the testimony and observed the demeanor and conduct of the witnesses as they testified, and he was in a better position to judge the credibility of the witnesses and weigh their testimony than this court. The findings of a Chancellor upon questions of fact and his judgment should be accepted by this court unless we believe they are palpably against the manifest weight of the evidence. (Kinnah vs. Kinnah, 184 Ill. 284; Floyd vs. Estate of Smith, 320 Ill. App. 171.)

When consideration of the testimony of plaintiff's witnesses as to conversations with Mr. and Mrs. Kramer with reference to applying the cost of the merchandise on the mortgage indebtedness is coupled with the admissions of Mrs. Kramer against interest as testified to by plaintiff's son, we are unable to say that the findings of the trial court were against the manifest weight of the evidence. On the basis of defendant Kramer's theory of this case, an open account for merchandise was allowed to run not only for almost twenty years, but for ten years after the mortgage debt was barred under her theory by the Statute of Limitations. Mrs. Kramer herself testified that no affirmative action was taken by either her or her husband to collect this alleged open account indebtedness other than to casually ask plaintiff to pay. All during this period of twenty years they continued to deliver large quantities of merchandise not only to the plaintiff but to

his death to pay the full amount. The chancellor found that after Barton Hunter's proof of the bar of the statute of limitations, the plaintiff had established the affirmative of the issue and had proved by a preponderance of the evidence that the statute had been tolled.

It appears from the evidence and the briefs of counsel that there is no dispute either as to the amount of the mortgage debt or as to the value of the aforementioned property at the disposition of the Hunter's estate.

In previously petitioning, there were over 100 signatures in obtaining moratoriums from the state through June 1933 to 1941. The Chancellor heard the testimony and observed the demeanor and conduct of the witnesses as they testified, and he was in a better position to judge the credibility of the witnesses and weigh their testimony than this court. The finding of a Chancellor upon questions of fact and the judgment should be accepted by this court unless we believe they are palpably against the material weight of the evidence. (Hines vs. Kimmel, 180 Ill. 276; Ford vs. Morris et Ducey, 190 Ill. App. 371.)

Upon consideration of the testimony of plaintiff's witnesses as to conversations with Mr. and Mrs. Hunter with reference to supplying the need of the mortgagor as full mortgage indebtedness is coupled with the admission of Mr. Hunter against interest as testified to by plaintiff's wife, we are unable to say that the findings of the trial court were against the manifest weight of the evidence. In the case of defendant Hunter's trial of this case, no open account for merchandise was allowed to run not only for almost twenty years, but for ten years after the statute had run barred under the theory of the tolling of limitations. Mrs. Hunter overall testified that her affirmative action was taken by either her or her husband to conflict with alleged open account indebtedness rather than to personally make payment to pay. All during that period of twenty years the mortgagee's daughter large quantities of groceries not only to the plaintiff but to

his whole family. She did not inventory this indebtedness in her capacity as executrix of her husband's estate. The foregoing, coupled with the other circumstances appearing in the record, seems in the opinion of this court not only to make the position of defendant Kramer untenable but incredible. We believe that each delivery of an item of merchandise to plaintiff or to his family constituted a part payment of the mortgage indebtedness under circumstances indicating an intention on the part of the Kramers to pay the full amount of the mortgage indebtedness and therefore tolled the running of the Statute of Limitations. We find that the plaintiff sustained the burden of proof with respect to proving the indebtedness and to the part payments tolling the Statute of Limitations.

We hold that the findings of the Chancellor are not against the manifest weight of the evidence and that he properly entered a decree of foreclosure in favor of the plaintiff for the amount found due.

Decree affirmed,

his whole family. She did not inventory this indebtedness in her capacity as executrix of her husband's estate. The foregoing, coupled with the other circumstances appearing in the record, seems in the opinion of this court not only to make the position of defendant in error untenable but incredible. We believe that each delivery of an item of merchandise to plaintiff or to his family constituted a part payment of the mortgage indebtedness under circumstances indicating an intention on the part of the Kroeses to pay the full amount of the mortgage indebtedness and therefore tolled the running of the Statute of Limitations. We find that the plaintiff sustained the burden of proof with respect to proving the indebtedness and to the part payments tolling the Statute of Limitations.

We hold that the findings of the Chancellor are not against the manifest weight of the evidence and that he properly entered a decree of foreclosure in favor of the plaintiff for the amount found due.

Decree affirmed.

Abstract

General No. 10654 Agenda No. 26

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

350 I.A. 170

October Term, A.D. 1952.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs ESTELLA M. SCHMIDT, et al., Appellants.	Appeal from the County Court of LaSalle County

Dove, P. J.

On January 5th, 1950, Estella M. Schmidt filed in the office of the clerk of the County Court of LaSalle County, Illinois, a verified petition alleging that her son, Isadore Schmidt, was in need of mental treatment and praying for an order so finding and for an order committing him to a suitable public or private hospital. Upon a hearing the following day, an order was entered so finding and committing him to the Department of Public Welfare for confinement and treatment in the Veteran's Division of the Elgin State Hospital.

On January 15, 1951, the said Estella M. Schmidt, together with one R. E. Peter Schmidt filed in the office of the county clerk of LaSalle County, their verified motion in which they alleged that they believed the said Isadore Schmidt

Abstract

Decided Jan. 1,1921. Writ No. 34

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. BERTHA M. VONHOLT, et al., Appellees.	Appeal from the County Court of LaSalle County.

Opinion, J. C. Ames.

On January 5th, 1920, Bertha M. Vonholt filed in the office of the clerk of the County Court of LaSalle County, Illinois, a verified petition alleging that her son, Leopore Vonholt, was in need of mental treatment and praying for an order so finding and for an order committing him to a suitable public or private hospital. Upon a hearing the following day, an order was entered by finding and committing him to the Department of Public Welfare for confinement and treatment in the Veterans's Division of the Elgin State Hospital.

On January 15, 1921, the said Bertha M. Vonholt, together with one F. C. Fahrenkamp filed in the office of the county clerk of LaSalle County, their verified motion in which they alleged that they believed the said Leopore Vonholt

was then in such condition of mind and body as to entitle him to be relieved of such adjudication and praying for his discharge. This petition was set for hearing on January 26, 1951; commissioners were appointed and filed their written report finding no improvement in the mental condition of Isadore Schmidt and recommending his retention in an institution for further treatment. On the same day this hearing was continued to be taken up by agreement of the parties. The record, however, does not show that any further proceedings were thereafter had on this petition.

On October 31, 1951, the said Estella M. Schmidt and the said R. E. Peter Schmidt filed a motion in lieu of a petition for a writ of error coram nobis on behalf of Isadore Schmidt. This motion alleged that the original petition of January 5, 1950 was based on false information from the State's Attorney's office; that Isadore Schmidt did not know the nature of the proceedings against him; that he was not represented by counsel; that he was coerced into waiving a jury trial; and that the provisions of the Mental Health Act are unconstitutional in that they deprive Isadore Schmidt of his liberty without due process of law. On November 14, 1951 the County Court sustained the motion of the State's Attorney to dismiss the motion in lieu of a petition for a writ of error coram nobis and from that order appellants appealed directly to the Supreme Court and that court transferred the cause to this court. (The People v. Schmidt, 413 Ill. 80).

In The People v. Janssen, 263 Ill. App. 101, it appeared that the County Court of Cook County on January 5, 1927 had found Frank Janssen insane. Thereafter and on January 30, 1930 upon a petition filed under Section 89 of the Practice Act, an order was entered expunging the adjudication

was then in such condition of mind and body as to entitle him to be relieved of such adjudication and confined for his treatment. This petition was set for hearing on January 20, 1951; commitments were subsequently and filed their written report finding no improvement in the mental condition of Isadore Sobeski and recommending his retention in an institution for further treatment. On the same day this hearing was continued to be taken up by agreement of the parties. The record, however, does not show that any further proceedings were therefrom had in this matter.

On October 20, 1951, the said Estelle [illegible] and the said E. E. Peter Sobeski filed a petition in lieu of a petition for a writ of error coram nobis on behalf of Isadore Sobeski. This petition alleged that the original petition of January 5, 1950 was based on false information from the State's Attorney's office; that Isadore Sobeski did not know the nature of the proceedings against him; that he was not represented by counsel; that he was deprived of a jury trial; and that the provisions of the Mental Health Act are unconstitutional in that they deprive Isadore Sobeski of his liberty without due process of law. On November 14, 1951 the County Court sustained the motion of the State's Attorney to dismiss the motion in lieu of a petition for a writ of error coram nobis and from that order appellants appealed directly to the Supreme Court and that court transferred the cause to this court. (The People v. Sobeski, 412 Ill. 60).

In The People v. Lemmen, 265 Ill. App. 102, it appeared that the County Court of Cook County on January 5, 1927 had found Frank Lemmen insane. Thereafter and on January 6, 1930 upon a petition filed under Section 88 of the Practice Act, an order was entered expunging the adjudication

of insanity from the record. Thereafter pursuant to another petition filed January 6, 1931 under the same Section 89 of the Practice Act, an order was entered which vacated the order which expunged the adjudication of insanity from the record. As a result of these two orders, the original adjudication that the defendant was insane remained. To reverse the second order, which vacated the previous order, an appeal was prosecuted to the Appellate Court. In the course of its opinion, the court said: (p. 102) "Both counsel have presented the matter upon the theory that both motions under section 89 were properly filed and their respective merits are argued in the briefs. However, we are of the opinion that Section 89 is not applicable to an inquest to determine whether or not a person is insane, and, therefore, the county court should not have entertained either motion. Section 89 of the Practice Act provides that the writ of error coram nobis is abolished and that all errors of fact committed in the proceedings of any court of record 'and which, by the common law, could have been corrected by said writ' may be corrected upon motion in writing upon reasonable notice, etc. In Chapman v. North American Life Ins. Co., 292 Ill. 179, are stated facts which at common law would be sufficient to cause a judgment to be reversed by the writ of error coram nobis, namely, that the nominal defendant was dead, an infant without a guardian, a feme covert, 'or a person insane at the time of trial'. This would seem to exclude an inquest of insanity. The Court then continued (p.104) "If Janssen desired to question the insanity proceedings held in January 1927 he could have done so by appeal or writ of error, but a motion under section 89 of the Practice Act has no place in a proceeding of this kind. The county court, therefore, should not have entertained the motion made in January 1930. For the same reason, the court should not have

of insanity from the record. Therefore pursuant to another petition filed January 2, 1951 under the same section 89 of the Practice Act, an order was entered which vacated the order which expunged the adjudication of insanity from the record. As a result of these two orders, the original adjudication that the defendant was insane remained. To preserve the second order, which vacated the previous order, an appeal was prosecuted to the Appellate Court. In the course of its opinion, the court said: (p. 104) "Both counsel have presented the matter upon the theory that both actions under Section 89 were properly filed and their respective merits are argued in the briefs. However, we are of the opinion that Section 89 is not applicable to an inquest to determine whether or not a person is insane, and, therefore, the county court should not have entertained either action. Section 89 of the Practice Act provides that the writ of error coram nobis is established and that all errors of fact committed in the proceedings of any court of record 'and which, by the common law, could have been corrected by said writ' may be corrected upon motion in writing upon reasonable notice, etc. In Chapman v. North American Life Ins. Co., 98 Ill. 179, are stated facts which at common law would be sufficient to cause a judgment to be reversed by the writ of error coram nobis, namely, that the original defendant was dead, no infant without a guardian, a feme covert, 'or a person insane at the time of trial'. This would seem to exclude an inquest of insanity. The lower court continued (p.104) "If lawyers desired to question the insanity proceedings held in January 1947 he could have done so by appeal or writ of error, but a motion under section 89 of the Practice Act has no place in a proceeding of this kind. The county court, therefore, should not have entertained the motion made in January 1950. For the same reason, the court should not have

entertained the second motion in January, 1931, under section 89. However, as the order of the court on the second motion vacated the prior order which expunged the adjudication of insanity, the record in the insanity proceedings now stands as it was originally and as it should be, and we shall not disturb it." The Court then concluded (p. 105) "However, we are of the opinion, as first above stated, that neither motion should have been entertained by the county court. As reversing the last order and remanding the cause would serve only to confuse the record and as we have said the record of the insanity proceedings now stands as it was originally, we shall enter in this court an order of affirmance without intending thereby to be understood as giving our approval to the filing of the two motions under section 89 in a proceeding of this sort."

In Seither & Cherry Co. v. Board of Education, 283 Ill. App. 392, the court in commenting upon a motion in lieu of a petition for a writ of error coram nobis, cited the cases of Marabia v. Thompson Hospital, 309 Ill. 147 and Village of Downers Grove v. Glos, 316 Ill. 563 and at page 402 said: "The errors which may be corrected by the court upon a motion of this kind are such errors of fact as could have been corrected by a writ of error coram nobis at common law. The errors of fact which can now be made the basis of a motion are not errors upon such questions of fact as arise upon the pleadings in the original case, or questions of fact averred in the pleadings upon which issue might have been taken, or such questions of fact as constituted the basis of the cause of action or defense upon the merits of the case or might have been pleaded as a defense to the merits. They are questions of the character mentioned in the cases or by the text-writers where the writ has been discussed as a means of correcting errors in the

substantial the second motion in January, 1937, under section 60. However, as the order of the court on the second motion vacated the prior order upon assuming the jurisdiction of insanity, the record in the insanity proceedings now stands as it was originally and as it should be, and we shall not disturb it." The Court then concluded (p. 102) "However, we are of the opinion, as first above stated, that neither motion should have been entertained by the probate court. As reversing the lower court and remanding the cause with leave only to reopen the record and as we have said the record of the insanity proceedings now stands as it was originally, we must order in this court an order of affirmance without intending thereby to be understood as giving any approval by the filing of the two motions under section 60 in a proceeding of this sort."

In Pittsburg Bessemer Co. v. Tomlinson, 1941, 241 Ala. 1, 1 So. 2d 1, the court in commenting upon a motion in lieu of a petition for a writ of error coram nobis, cited the cases of Harris v. Tennessee Coal Co., 1921, 207 Ala. 147, 92 So. 1; Downey v. Cox, 1918, 203 Ala. 520, 84 So. 4, and said: "The errors which may be corrected by the court upon a motion of this kind are such errors of fact as could have been corrected by a writ of error coram nobis at common law. The errors of fact which can be made the basis of a motion are not errors from such conclusions of fact as arise upon the pleadings in the original case, or conclusions of fact entered in the judgment upon which issue might have been taken, or such questions of fact as constituted the basis of the cause of action or defense upon the merits of the case or might have been pleaded as a defense in the merits. They are questions of the character mentioned in the cases or by the text-writers where the writ has been disallowed as a bond of correcting errors in the

same court, and referred to the disability of parties, the incapacity of the plaintiffs to sue or the disability of the defendants to defend, such as infancy, coverture, death of one or more of the parties, death of a joint party, insanity. Any of these facts, if known to the court, would prevent the entry of a judgment, and it is error arising out of lack of knowledge by the court of such facts that the writ of error coram nobis, or the motion which is its substitute, applies, and not to lack of knowledge on the part of the court of facts constituting a cause of action or a defense to it. In many States the difference in forms of action and methods of procedure in law and equity has been abolished, and the decisions of such States with reference to the relief which may be obtained on motion and the method of procedure throw no light on the practice at common law. No cases have been cited to us which carry the right of relief upon a writ of error coram nobis at common law beyond the cases specified by Tidd and the other writers which have been cited. (Citing cases). Only such errors of fact, committed in the proceedings of any court of record, and which by common law could have been corrected by the writ of error coram nobis, may be corrected by the court in which the error was committed upon motion in writing."

In Chapman v. North American Insurance Company, 292 Ill. 179, it was held that a motion in lieu of a petition for a writ of error coram nobis will not lie to contradict or put in issue any fact that has been adjudicated in the action. In the course of it's opinion the court said (p. 185-6): "The error of fact alleged must not be one appearing on the face of the record or one contradicting the finding of the court. All such errors are treated as errors of the court, and the court cannot set aside a judgment entered by it for errors committed by it, after the term of court has ended. Such

same court, due reference to the disability of parties, the incapacity of the identity to sue or the disability of the defendant to defend, such as infancy, coverture, death of one or more of the parties, death of a joint party, insanity. Any of these facts, if known to the court, would prevent the entry of a judgment, and it is error arising out of lack of knowledge by the court of such facts not to take cognizance, or the action which is its ministerial, insofar as not to lack of knowledge on the part of the court of their existence a mere of action on a defense to it. In many states the difference in form of action and methods of procedure in law and equity has been modified, and the decisions of such states with reference to the relief which may be obtained on motion and the method of procedure there no longer on the practice at common law. No cases have been cited to us which deny the right of relief upon a writ of error coram nobis at common law beyond the cases specified by Tidd and the other writers which have been cited. (Citing cases). Only such errors of fact, committed in the proceedings of any court of record, and which by common law would have been corrected by the writ of error coram nobis, may be corrected by the court in which the error was committed upon motion in writing."

In Chesney v. North American Insurance Company, 298 Ill. 170, it was held that a motion in lieu of a petition for a writ of error coram nobis will not lie to contradict or put in issue any fact that has been adjudicated in the action. In the course of its opinion the court said (p. 180-2): "The error of fact alleged must not be the mere error on the face of the record or one contradicting the finding of the court. All such errors are treated as errors of the court, and the court cannot set aside a judgment rendered by it for errors committed by it, after the term of court has ended. Among

errors must be reviewed on writ of error proper or by appeal to an appellate or reviewing court. It is important in considering this question to keep in mind this proposition; that the trial court cannot review itself or its own judgment and correct the same, either as to any question of fact found or decided by the court or as to any question of law decided by it after the term of court has ended." And again on page 189 the court concluded: "As already stated, the court was without right or power to set aside its judgment for any error of its own, whether as to matters of fact or as to matters of law. Such errors could only be considered by a reviewing court on a writ of error proper for such purpose. Error coram nobis does not lie to contradict or put in issue any fact that has been adjudicated in the action, or to correct any error in the judgment of the court."

At the time the instant motion was filed there was a petition for discharge on file which had been continued indefinitely and was to be re-set for hearing upon agreement of the parties. If Isadore Schmidt had recovered from his mental illness, a hearing to determine that fact could have been had under that petition and the appropriate order entered, but all of the authorities are to the effect that if a party has been adjudicated insane and in need of mental treatment by a court which had jurisdiction and authority to make such a determination such party cannot later proceed as appellants have attempted to proceed in the instant case.

The settled law of this State expressly prohibited the county court from entertaining the motion of October 31, 1951 which sought to review the insanity proceedings and the order entered in connection therewith on January 6, 1950. The trial court did not err in entering the order appealed from and that order will be affirmed.

Judgment order affirmed.

errors may be reviewed on writ of error proper or by appeal to an appellate or reviewing court. It is important in considering this question to keep in mind this proposition: that the trial court cannot review itself or its own judgment and correct the same, either as to any question of fact found or decided by the court or as to any question of law decided by it after the term of court has ended. I cite again on page 189 the court continued: "As already stated, the court has without doubt or cause in not making its judgment for any error of its own, whether as to matters of fact or as to matters of law. Such errors could only be considered by a reviewing court on a writ of error proper for such purpose. Error cannot make them, or to constitute it not in law a act that has been adjudicated in the action, or to correct any error in the judgment of the court."

At the time the instant action was filed there was a petition for injunction on file which had been withdrawn indefinitely and was to be re-set for hearing upon agreement of the parties. If Isadore Smith had received from his mental illness, a desire to determine that fact could have been had under that petition and the consolidate order entered, but all of the authorities are to the effect that if a party has been adjudicated insane and is need of mental treatment by a court which has jurisdiction and authority to make such a determination such party cannot later proceed as supplicant but attempted to proceed in the instant case.

The entire law of this State concerning prohibited the county court from entertaining the petition of December 21, 1921 which sought to revive the insanity proceedings and the order entered in connection therewith on January 6, 1920. The trial court did not err in sustaining the order appealed from and that order will be affirmed.

Judgment order affirmed.

3393

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No. 10668 Agenda No. 14

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

--- 350 I.A. 171

February Term, A. D. 1953

MARRENA GABLE, as Conservator of the Estate of CLARA PROMENSCHENKEL, an Incompetent Person, Plaintiff-Appellant vs PAUL PROMENSCHENKEL, Defendant-Appellee	Appeal from the Circuit Court of Carroll County

Dove, P.J.

On September 5, 1951 Marrena Gable, as Conservator of the Estate of her mother, Clara Promenschenkel, filed her verified petition in the County Court of Carroll County in which she alleged, upon information and belief, that her brother, Paul Promenschenkel, has in his possession or control certain assets belonging to the estate of her ward consisting of $10,000.00 in money and title papers and an abstract of title to incompetent's homestead property located in Savanna, Illinois. A citation was issued as prayed and a hearing had resulting in the dismissal of the petition. Upon an appeal to the circuit court a like order was entered and to reverse that order the record is brought to this court upon an appeal by the Conservator.

It appears from the record that the husband of Clara Promenshhenkel was a farmer and died in 1944 leaving three adult sons, Homer, Ray and Paul Promenschenkel and one adult

No. 1,000 Docket No. 11

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1968

PATRICK GILES, as Conservator of the Estate of CLARA FRONEK-SCHERNER, an Incompetent Person, Plaintiff-Appellant, vs. PAUL FRONEK(SCHERNER), Defendant-Appellee	Appeal from the Circuit Court of Carroll County

Dove, P.J.

On September 6, 1961 Patrick Giles, as Conservator of the Estate of her mother, Clara Fronek(Scherner), filed her verified petition in the County Court of Carroll County in which she alleged, upon information and belief, that her brother, Paul Fronek(Scherner), has in his possession or control certain assets belonging to the estate of her ward consisting of $10,000.00 in money and title papers and an instrument of title to incompetent's homestead property located in Savanna, Illinois. A citation was issued as prayed and a hearing had resulting in the dismissal of the petition. Upon an appeal to the circuit court a like order was entered and to reverse that order the record is brought to this court upon an appeal by the Conservator.

It appears from the record that the mother of Clara Fronek(Scherner) was a farmer and died in 1941 leaving surviving some, Henry, Guy and Paul Fronek(Scherner) and one adult

daughter, Marrena Gable, surviving. At that time Homer was 32 years of age and prior to the death of his father he was engaged in farming with his father and thereafter, for one year with his mother. After March 1, 1949 his mother had no interest in his farming operations. In 1946 Clara Promenschenkel moved to Savanna into a house owned by her sister, Margaret Ulrich who subsequently died and Mrs. Promenschenkel became the owner of this property. Her son, Paul, unmarried, and who was 31 years of age in 1951 made his home with his mother and his Aunt , Margaret Ulrich, in this house and continued to live there with his mother after the death of his aunt, Mrs. Ulrich. He paid the light and water bills each month and the evidence shows that he painted the outside of the house and also did some inside painting, bought some coal, took care of the fire, hauled ashes, did some cooking when his mother was ill, drove his mother on occasions and engaged in various other activities of a similar nature and as his brother expressed it "he was generally doing the duties of a man about the house". In addition to the home where Paul and his mother lived, Mrs. Promenschenkel owned some stock in the Galena National Bank which she received from her sister's estate which was sold thereafter for $350.00 and she also received in February 1951 $1350.00, her distributive share arising from the sale of property which had belonged to her deceased brother. On March 12, 1951 Mrs. Promenschenkel closed her account in the National Bank of Savanna, withdrawing therefrom $3483.31. She so informed her son, Paul, who was with her at that time and from the record it is reasonable to conclude she thereafter kept practically all of this money in a dresser drawer in her bed room.

Gerald Haase testified that he lived in Savanna and had known Paul Promenschenkel since November 1950 and was

daughter, Morrena Gable, surviving. At that time Homer was 22 years of age and prior to the death of his father he was engaged in farming with his father and thereafter, for one year with his mother. After March 1, 1949 his mother had no interest in his farming operations. In 1948 Clara Frommenhenkel moved to Savanna into a house owned by her sister, Margaret Ulrich who subsequently died and Mrs. Frommenhenkel became the owner of this property. Her son, Paul, unmarried, and who was 21 years of age in 1951 made his home with his mother and his Aunt, Margaret Ulrich, in this house and continued to live there with his mother after the death of his aunt, Mrs. Ulrich. He paid the light and water bills each month and the evidence shows that he painted the outside of the house and also did some inside painting, bought some coal. Took care of the fire, hauled ashes, did some cooking when his mother was ill, drove his mother on occasions and engaged in various other activities of a similar nature and as his brother expressed it "he was generally doing the duties of a man about the house". In addition to the home where Paul and his mother lived, Mrs. Frommenhenkel owned some stock in the Galena National Bank which she received from her sister's estate which was sold thereafter for $450.00 and she also received in February 1951 $1500.00, her distributive share arising from the sale of property which had belonged to her deceased brother. On March 19, 1951 Mrs. Frommenhenkel closed her account in the National Bank of Savanna, withdrawing therefrom $4437.21. She so informed her son, Paul, who was with her at that time and from the record it is reasonable to conclude she thereafter kept practically all of this money in a dresser drawer in her bed room.

Gerald Hayes testified that he lived in Savanna and had known Paul Frommenhenkel since November 1950 and was

acquainted with his mother and had been in her home on numerous occasions and arrived there about one or 1:30 o'clock on a Sunday afternoon about the middle of May, 1951. As abstracted this witness continued: "I was in the living room most of the afternoon, Paul and me and Paul's mother were there. Paul's mother went upstairs and came back and had a jar of money which she gave Paul. She said she wanted him to have this --'I want you to have this money for what you have done for me' and also said when she came into the room that she wanted to do it while I was there. Paul asked her what for, she said because of things he had done for her all along." Upon cross examination this witness testified that when he arrived at the Promenschenkel home that Sunday afternoon Paul and his mother were there; that he remained until three or four o'clock in the afternoon and after he had been there an hour or an hour and a half Mrs. Promenschenkel went upstairs and got the jar of money but nothing was said by any one as to the amount of money in the jar but Paul told the witness about the amount later; that nobody counted the money and that after she gave the jar to Paul he went upstairs with it; that the jar was a plain glass jar with a lid and all the money in the jar was paper money.

Paul Promenschenkel testified that he was a single man, 31 years of age and on July 31, 1951 deposited to his own credit in the Mt. Carroll National Bank at Mt. Carroll the sum of $3200.00 all in currency; that this money was given to him by his mother at her home about the middle of May upon the occasion testified to by Gerald Haase; that his mother must have felt that she was indebted to him in some way or she would not have given it to him; that when he received this money from his mother he did not give her any writing to show he had received

consulted with his mother and had been in her home on numerous occasions and arrived there about one or 1:30 o'clock on a Sunday afternoon about the middle of May, 1951. As abstracted this witness continued: "I was in the living room most of the afternoon. Paul and he and Paul's mother were there. Paul's mother went upstairs and came back and had a jar of money which she gave Paul. She said she wanted him to have this --'I want you to have this money for what you have done for me' and also said when she came into the room that she wanted to do it while I was there. Paul asked her what for, she said because of things he had done for her all along." Upon cross examination this witness testified that when he arrived at the Fronenschenkel home that Sunday afternoon Paul and his mother were there; that he remained until three or four o'clock in the afternoon and after he had been there an hour or an hour and a half Mrs. Fronenschenkel went upstairs and got the jar of money but nothing was said by any one as to the amount of money in the jar but Paul told the witness about the amount later; that nobody counted the money and that after she gave the jar to Paul he went upstairs with it; that the jar was a plain glass jar with a lid and all the money in the jar was paper money.

Paul Fronenschenkel testified that he was a single man, 31 years of age and on July 31, 1951 deposited to his own credit in the Mt. Carroll National Bank at Mt. Carroll the sum of $3300.00 all in currency; that this money was given to him by his mother at her home about the middle of May upon the occasion testified to by Gerald Hanna; that his mother must have felt that she was indebted to him in some way, or she would not have given it to him; that when he received this money from his mother he did not give her any writing to show he had received

it but his mother was in the habit of keeping a record of her financial transactions; that he didn't spend any of the $3200.00 upon his mother; that from the time his mother gave him this money he kept it in the same glass jar in a dresser drawer in the home where he lived with his mother until he deposited it in the bank on July 31, 1951.

Homer Promenschenkel testified that he was 39 years of age and a son of Clara Promenschenkel and a brother of Paul and Ray Promenschenkel and Marrena Gable; that about the first of June 1951 he was at his mother's home in Savanna and while sitting and talking to her she told him she had given Paul $3200.00 for what he had done for her in the past; that Paul was not present when his mother told him this altho he was somewhere about the house; that he, Homer, knew his mother kept money in her home as she had told him she did.

A letter ~~dated~~ in the handwriting of Clara Promenschenkel dated June 24, 1951 and mailed from Savanna on July 6, 1951 and addressed to her son Ray L. Promenschenkel at Wichita, Kansas and received by him there was offered in evidence. In this letter Mrs. Promenschenkel states she is ill and alone so much and that her sickness works on "the nerves of her stomach." Her letter continues: "Many times I wish you were here. I know you would not left me alone. I have been a good mother to all of youse. I helped Marrena a lot with a sick baby. I helped Paul with money over $2000 dollars. I am cashing in every thing then I can give each one there share. I will set aside 1000 to bury me and there wont be any money for cort costs and the attorneys -- I have a lot to tell you when I see you again. I don't need an operation, it is gas on my stomack so terrible it nearly kills me, caused from artrites, it effects the nerves of my stomack and then my food won't digest causing gas. I wish you would come. I know you care for me. Your sick mother with love." A note book

It was his mother who in the habit of keeping a record of her financial transactions; that he didn't spend any of the $1000.00 upon his mother; that from the time his mother gave him this money he kept it in the same place in a drawer except in the home where he lived with his mother until he deposited it in the bank on July 22, 1951.

Roger Fronsenbenkel testified that he was 24 years of age and a son of Clara Fronsenbenkel and a brother of Paul and Ray Fronsenbenkel and Marsha Dahle; that about the first of June 1951 he was at his mother's home in Havana and while sitting and talking to her she told him she had given Paul $1000.00 for what he had done for her in the past; that Paul was not present when his mother told him this altho he was somewhere about the house; that he, himself, knew his mother kept money in her home as she had told him she did.

A letter dated in the handwriting of Clara Fronsenbenkel dated June 14, 1951 and mailed from Havana on July 2, 1951 and addressed to her son Ray L. Fronsenbenkel at Wichita, Kansas and received by him there was offered in evidence. In this letter Mrs. Fronsenbenkel states she is ill and alone so much and that her sickness works on the nerves of her stomach." Her letter continues: "Many times I wish you were here. I know you would not left me alone. I have been a good mother to all of you. I helped Harvey a lot with a sick baby. I helped Paul with money over Fancy dollars. I am counting in every thing then I can give each one there share. I will set aside 1000 to bury me and there will be my money for court costs and the attorney -- I have a lot to tell you when I see you again. I don't need an operation, it is you on my stomach so terrible it nearly kills me, caused from worries, it affects the nerves of my stomach and then my food don't digest causing gas. I wish you would come. I know you care for me. Your sick mother with love." A note book

with one sheet missing and containing various entries in the handwriting of Mrs. Promenschenkel, the mother, was also introduced in evidence. Appellee testified he had seen this book, did not know who removed the missing sheet; that he never removed it and did not know what may have appeared on that sheet. He also testified that he had never taken any money from the dresser drawer in his mother's room but that subsequent to the time his mother gave him the $3200.00 she also gave him an additional $30.00.

On August 3, 1951 Homer Promenschenkel and his sister, Marrena Gable went with their mother and brother, Paul Promenschenkel in Paul's car from the mother's home in Savanna to Dixon where she entered the Dixon hospital for treatment. On August 6, 1951 she was adjudged mentally ill by the County Court of Lee County and committed to the East Moline State Hospital at East Moline, Illinois. Thereafter and on August 10, 1951, appellant, upon her verified petition, which alleged that the approximate value of the personal estate of Clara Promenschenkel is $1000.00 and the value of the improvements upon her real estate is $5000.00, was appointed conservator of the estate of her mother. At the same time, September 5, 1951, when this petition for a citation was filed by appellant against appellee, appellant also filed a similar petition against Homer Promenschenkel which also resulted in an order dismissing the same and from that order appellant did not prosecute an appeal.

Appellee testified that his mother's physical condition on August 3, 1951 when he took her to Dixon, was "pretty bad"; that she walked but complained of her back; that he noticed symptons of her mental condition two or three weeks before August 6, 1951 and that she talked at that time mainly about religion. Homer Promenschenkel testified that his mother's

with one sheet missing and containing various entries in the handwriting of Mrs. Fromenschnabel, the mother, was also introduced in evidence. Appellee testified he had seen this book, did not know who removed the missing sheet; that he never removed it and did not know what may have appeared on that sheet. He also testified that he had never taken any money from the dresser drawer in his mother's room but that subsequent to the time his mother gave him the $4000.00 she also gave him an additional $4,000.00.

On August 4, 1951 Homer Fromenschnabel and his sister, Marcena Fable went with their mother and brother. Paul Fromenschnabel in Paul's car from the mother's home in Savanna to Dixon where she entered the Dixon Hospital for treatment. On August 8, 1951 she was adjudged mentally ill by the County Court of Lee County and committed to the West Moline State Hospital at West Moline, Illinois. Thereafter and on August 10, 1951, appellant, upon her verified petition, which alleged that the approximate value of the personal estate of Ollie Fromenschnabel is $1000.00 and the value of the improvements upon her real estate is $1000.00, was appointed Conservator of the estate of her mother. At the same time, September 6, 1951, when this petition for a citation was filed by appellant against appellee, appellant also filed a similar petition against Homer Fromenschnabel which also resulted in an order disclaiming the same and from that order appellant did not prosecute an appeal.

Appellee testified that his mother's mental condition on August 6, 1951 when he took her to Dixon, was "pretty bad"; that she talked but complained of her back; that he noticed symptoms of her mental condition two or three weeks before August 6, 1951 and that she talked at that time mainly about religion. Homer Fromenschnabel testified that his mother's

mentality, when he talked with her about June 1, 1951, was good and that he could not see any difference in her mental condition from what it had always been until about three weeks before August 3, 1951. Appellant testified that her mother's mental condition began some seven years before when her husband died; that she was suffering from heart trouble and had difficulty in breathing and she noticed about one year before her committment some peculiar things in her conversation and conduct and that in April, 1951, there "was an occasion when there seemed some reason to think that she was slipping mentally."

Ray Promenschenkel testified that he was thirty-four years of age and lived in Wichita, Kansas, and that while his mother was at the Dixon hospital he came to Illinois, and at the Dixon hospital his mother said to him: "Ray, if you need money at any time, Paul has my money. If you want some, ask for it, he has it." He further testified that his mother didn't mention the amount she had given Paul but stated that Paul told her he had put it in the Mt. Carroll bank.

Edith Savage testified that she lived in the house next door to the home where Clara Promenschenkel lived; that two or three days before Mrs. Promenschenkel went to the Dixon hospital, Mrs. Promenschenkel came to her home about 11:30 o'clock in the evening and, at Mrs. Promenschenkel's request, Mrs. Savage and her husband went with Mrs. Promenschenkel to her home and Mrs. Savage went with her upstairs to her room; that Mrs. Promenschenkel unlocked the right-hand drawer in her dresser, and she observed that Mrs. Promenschenkel started to put some of the money from the drawer in her pocketbook and then put it back in the dresser drawer and locked the drawer. Mr. Savage testified that he accompanied his wife and Mrs. Promenschenkel to the door of the Promenschenkel home but did not go in. This witness further testified that the next morning he talked to both Paul and Homer about the incident and told them that their mother appeared to be quite worried about her money.

Suddenly, when he failed with her about June 5, 1932, and good and then he could not see any difference in her mental condition from what it had/been until about three weeks before August 5, 1932. Plaintiff believes that her husband's mental condition began some seven years before that but because of his love and affection for her he was sufficient from heart trouble and the difficulty in breathing and has endured along and just before her confinement some peculiar things in her conversation and conduct and that in April, 1932, there was no occasion when there seemed any reason to think that she was disposed mentally.

6. Plaintiff-husband testified that he was thirty-seven years of age and lived in Dublin, Kansas, and that until his marriage was at the place employed he was in Dublin, and at the time employed his wife came to Kansas. "Q. If you were going to any place, you had to go away. If you went home, and for it, he has it." In further testimony that his wife didn't mention the account she had given you about that fact until she had to and you to in the it. Overall book.

Mrs. Hodge testified that she lived in the house next door to the home where Plaintiff-husband lived; that she or Mrs. Hodge saw Plaintiff-husband when he was coming home; that Plaintiff-husband came to her house about 11:30 o'clock in the evening and, in her, Plaintiff-husband requested, Mrs. Hodge and her husband went with her. Plaintiff-husband to take them and that Mrs. Hodge was also at her operation to her room; that Plaintiff-husband unlocked the kitchen door in her chamber, and she observed that Plaintiff-husband attempted to put some [illegible] from the dresser in her pocketbook and then put it back in the chamber dresser and turned the drawer. Mr. Hodge testified that he accompanied his wife and Mrs. Plaintiff-husband to the door of the Plaintiff-husband home but did not go in. Mrs. Hodge further testified that the door opening as related to Mrs. Hodge and Plaintiff-husband was only wide enough when Mrs. Hodge appeared to be trying to conceal some her money.

Upon the hearing appellant introduced a dress of her mother's, the pocket of which was closed with a safety pin, and inside the pocket were some keys on a string, one of which was the key to the dresser drawer in her mother's upstairs bedroom where her mother had kept her money. In this pocket was also a slip of paper upon which was written in the mother's handwriting: "4860 upstairs in buerry; 1.60 in change small pocket book; 60 dollars in 10 dollar bills; 2 in a bill; 9 bill a fold; 4860 in 500 dollar lots; 180 in 20 d'bills; 9 dollars in billfold." When this was written does not appear.

Lillie Promenschenkel testified that she was the wife of Homer Promenschenkel, knew the members of the family, and on the day Mrs. Promenschankel was taken to the East Moline Hospital she had a conversation with appellant; that Homer, Marrena, Ray, Paul and Ray's wife were present and she, the witness, told them just how Homer's mother said she wanted things; and, subject to the objection of counsel for appellant that this testimony was hearsay, this witness stated that the mother had said she had given Paul this money and wanted him to have the home.

The foregoing is a substantial resume of the evidence found in this record. Counsel agree that the law is that proof of a gift of personalty must be clear and convincing and that a gift is only effected when the donor delivers the subject matter of the gift to the donee, irrevocably and absolutely, with an intention of vesting title and right to immediate possession in the donee (Northern Trust Co. v. Swartz, 309 Ill. 586; Storr v. Storr, 329 Ill. App. 537).

It is insisted by counsel for appellant that the testimony of appellee and his friend, Haase, is absurd, improbable and incredible; that the evidence does not show that the mother intended to pass title to this $3200.00 to appellee but rather that, a few days before she went to the hospital, she placed this money in the hands of her son for safekeeping only.

Upon the marriage appellant introduced a dress of her mother's, the pocket of which was fitted with a safety pin, and inside the pocket were some keys on a string, one of which was the key to the dresser drawer in her mother's upstairs bedroom where her mother had kept her money. In this pocket was also a slip of paper upon which was written in the mother's handwriting: "$600 yearlings in bearer; 1.40 in change small pocket book; 40 dollars in 10 dollar bills; 2 in 5 bill; 9 with a fold; $680 in 500 dollar note; 180 in 20 dollars; 9 dollars in silver." When this was written does not appear.

Dixie Fromhagenmeyer testified that she was the wife of Homer Fromhagenmeyer, knew the members of the family, and on the day in Florence Mikel was taken to the back kitchen and had a conversation with appellant; that Homer, Martha, Ray, Pearl and Ray's wife were present and she, the witness, told them just how Homer's mother said she wanted things, and, subject to the objection of counsel for appellant that this testimony was hearsay, this witness stated that the mother had said she had given Pearl this money and wanted him to save the home.

The foregoing is a substantial resume of the evidence found in this record. Counsel argue that the law in that proof of a gift of personalty must be clear and convincing and when a gift is only alleged when the donor delivers the subject matter of the gift to the donee, irrevocably and absolutely, with an intention of vesting title and right to immediate possession in the donee (Martinsen Final Co. v. Martin, 320 Ill. 590; Storr v. Storr, 324 Ill. App. 527).

It is insisted by counsel for appellant that the testimony of appellee and his friend, Dixie, is sketchy, improbable and unreliable; that the evidence does not show that the mother intended to pass title to this $320.00 to appellee and rather that, a few days before she went to the hospital, she placed this money in the hands of her son for safekeeping only.

Perhaps it is unusual, as counsel argue, for a mother sixty-five or sixty-seven years of age to give her youngest son, to the exclusion of her other children, a substantial part of her money. She clearly was under no legal obligation to him but, if mentally capable, she had a perfect right to do so, and there is nothing in the record to show that at the time she delivered this jar of money to appellee she was not mentally capable of scing so.

Appellee, Paul Promenschenkel, testified as a court's witness. Both trial courts believed his testimony. He was corroborated by Gerald Haase, and it may be inferred that in her letter to Ray in June where she said she had "helped Paul with money over $2000.00" she is referring to this gift.

Further, Homer Promenschenkel, upon his examination by counsel for appellant was asked this question: "Did your mother ever tell you about giving your brother Paul, $3200.00?" answered "Yes." He was then asked: "When?" and Homer replied: "Along about, I would say, the first of June." He was then asked: "Of 1951?" and he answered in the affirmative. He was then asked: "Where were you then at that time?" and he answered: "At her home." The next question: "Who all was present at that time?" and the answer: "I think Paul was in the house but he was not right there. I was sitting there talking to her." Counsel then inquired: "Did she say for what purpose she had delivered that money to him?" and Homer answered: "Yes, she said for what he had done for her in the past." Counsel then asked: "That was all said there in the home in Savanna?" and the witness answered: "Yes."

The mother's reason for making this gift to appellee, as expressed by her to her son Homer, was a desire on her part to compensate appellee for what he had done for her in the past, and the record shows the services he rendered and in what way his life was ordered to contribute or promote her well-being. Counsel for appellant state that appellee did nothing

Perhaps it is unusual, as counsel argue, for a mother sixty-five or sixty-seven years of age to give her youngest son, to the exclusion of her other children, a substantial part of her money. The charity was under no legal obligation to him but, if mentally capable, she had a perfect right to do so. And there is nothing in the record to show that at the time she delivered this jar of money to appellee she was not mentally capable of doing so.

Appellee, Paul Promenschenkel, testified as a courtesy witness. Both trial courts believed his testimony. He was corroborated by several cases, and it may be inferred that in her letter to Fay in June where she said she had "helped Paul with money over $2000.00" she is referring to this gift.

Further, lower Promenschenkel, upon his examination by counsel for appellants was asked this question: "Did your mother ever tell you about giving your brother Paul $2500.00?" answered "Yes." He was then asked: "When?" and Homer replied: "Along about, I would say, the first of June." He was then asked: "Did [illegible] and he answered in the affirmative. He was then asked: "Where were you then at that time?" and he answered: "At her home." The next question: "Do all was present at that time?" and the answer: "I didn't and was in the house but he was not right there. I was doing some talking to her." Counsel then inquired: "Did she say for what purpose she had delivered that money to him?" and Homer answered: "Yes, she said for what he had done for her in the past." Counsel then asked: "That was all said there in the home in Savanna?" and the witness answered: "Yes."

The mother's reason for making this gift to appellee, as expressed by her to her son Homer, was a desire on her part to compensate appellee for what he had done for her in the past, and the record shows the services he rendered and in what way his life was ordered to benefit or promote her well-being. Counsel for appellant state that appellee did nothing

more for his mother than any son normally would do. That the mother had maintained and supported him for many years and, therefore, the son was obligated to the mother rather than the mother to the son. If appellee is the kind of a son pictured by counsel for appellant, he may have needed some financial help from his mother which her other children did not require.

We have read this record and considered the briefs submitted and the earnest arguments advanced and able presentation of this case by counsel for appellant. The questions of fact arising on this record were resolved by the County Court in favor of appellee. The Circuit Court reviewed the record and arrived at the same conclusion as the County Court. In Storr v. Storr, 329 Ill. App. 537, at page 545, this court quoted from Schwaan v. Schwaan, 320 Ill. App. 287, 295, as follows: "The witnesses appeared before the judge of the probate court and also before the trial judge in the superior court. Both had opportunities to observe their demeanor upon the witness stand, and to consider all of the facts and circumstances as brought out by the evidence. The decision of the trial judge upon matters of fact cannot lightly be set aside."

In our opinion, appellee did not, under the facts disclosed by this record, stand in a fiduciary relation to his mother (Healy v. Stevens, 347 Ill. 202), and the judgment of the Circuit Court, in dismissing the petition of appellant, is not against the manifest weight of the evidence and that judgment is, therefore, affirmed.

Judgment affirmed.

more for his mother than any son normally would do. That the mother had maintained and supported him for many years and, therefore, was now obligated to the mother rather than the mother to the son. If appellee is the kind of a son pictured by counsel for appellant, he may have needed some financial help from his mother which the other children did not require.

We have read this record and considered the briefs submitted and the earnest arguments advanced and the presentation of this case by counsel for appellant. The questions of fact arising on this record were resolved by the County Court in favor of appellee. The Circuit Court reviewed the record and arrived at the same conclusion as the County Court. In Storr v. Storr, 32 Ill. App. 321, at page 325, this court quoted from Sorensen v. Sorensen, 320 Ill. App. 207, 229, as follows: "The witnesses appeared before the judge of the probate court and also before the trial judge in the superior court. Both had opportunities to observe their demeanor upon the witness stand, and to consider all of the facts and circumstances as brought out by the evidence. The decision of the trial judge upon matters of fact cannot lightly be set aside."

In our opinion, appellee did not, under the facts disclosed by this record, stand in a fiduciary relation to his mother (Hall v. Storrs, 32 Ill. 223), and the judgment of the Circuit Court, in dismissing the petition of appellant, is not against the manifest weight of the evidence and that judgment is, therefore, affirmed.

Judgment affirmed.

173 A

45856

350 I.A. 260[1]

DELLA E. WENZEL, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
CATHERINE E. CRADDOCK GORMAN, et al., Defendants,	)	COOK COUNTY.
On Appeal of COMMERCIAL CREDIT CORPORATION, a corporation, Appellant.	)	

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed this action for accounting on September 24, 1947. Catherine E. Craddock Gorman only was made defendant. By an amendment to the complaint filed December 24, 1947, James J. Cusack, a member of the Illinois bar, Maurice D. Hartcau, Felz Motor Sales, Inc., and Commercial Credit Corporation were made additional defendants. For convenience, we shall refer to defendant Felz Motor Sales, Inc. as Felz, Commercial Credit Corporation as Commercial, and Wenzel Automobile Sales Company as Wenzel company.

An amended complaint was filed January 18, 1949, in which she alleged that A. C. Wenzel, her husband, died testate July 29, 1941; that she was sole legatee and devisee under the will of said decedent; that his estate was probated and closed on March 31, 1943, and thereupon she became entitled to all the property belonging to said estate; that among the assets in said estate were 498 shares, out of a total authorized issue of 500 shares, of the capital stock of the Wenzel Automobile Sales Company, an Illinois corpor-

ation; that said company was in the business of buying and selling new and used automobiles, accessories and parts and had a franchise from the manufacturers of the DeSoto and Plymouth automobiles for the exclusive sale of said automobiles in an area of approximately five square miles on the north side of Chicago; that said corporation was dissolved by a decree entered in the Superior Court of Cook County on March 29, 1944, and that plaintiff thereupon became entitled to all of the assets belonging to said corporation at the time of its dissolution.

It is unnecessary to refer to the many allegations in the amended complaint as to the defendants other than Commercial. As to Commercial, it is alleged that the Wenzel company had executed and delivered to Commercial certain trust receipts covering new and used automobiles located in the business premises of the Wenzel company, and that Commercial wrongfully took possession, foreclosed and sold the automobiles covered by said trust receipts, in violation of the Uniform Sales Act (Ch. 121-1/2, pars. 166-171 inclusive, Ill. Rev. Stat. 1951).

Answers were filed by defendants. Part of the answer of Commercial set up laches and estoppel as special defenses. The cause was referred to a master to report his conclusions of fact and law. After a hearing before the master, he recommended that the complaint be dismissed for want of equity. Exceptions were filed by plaintiff to the report of the master and were overruled as to all defendants except Commercial and sustained as to the latter. A decree

for accounting was entered against Commercial, and the cause re-referred to the master to take an account, from which decree said defendant appeals.

The decree contains the following findings:

"Plaintiff's ignorance of her rights is only a unilateral mistake of either law or fact. Her counsel's advice is not chargeable to Commercial Credit Corporation.

"The repossession and foreclosure by defendant Commercial Credit Corporation after plaintiff's refusal to continue with the business are binding upon her.

"However, plaintiff's consent was for repossession and foreclosure only. She did not waive her equity in the cars. The agreement was for foreclosure under the provisions of the Uniform Trust Receipts Act.

"Under the provisions of Section 171 (3-B) of the Uniform Trust Receipts Act a public sale is required if the entruster becomes a purchaser. The Act provides for any surplus to be paid to the trustee.

"Aside from the provisions of the Act, a foreclosure sale must be conducted fairly so as to yield the best price obtainable.

"There was no public sale. The defendant Commercial Credit Corporation was the purchaser for the amount of the indebtedness. The prices paid by Commercial Credit Corporation, in many instances, were obviously below the amount which could have been realized at a fair sale. The prices paid by the said defendant at the sale in 1941 for 1941 and 1942 cars in sums ranging between $400.00 and $750.00 is conclusive proof of the unfairness of the sale.

"The plea of laches has not been sustained by the evidence for the reason that defendant Commercial Credit Corporation destroyed its records six months after the purported sale as a matter of company policy. * * *

"The sale to the defendant Commercial Credit Corporation was wrongful because it was not in compliance with the Uniform Trust Receipts Act and because its purchase at unfair prices will not be tolerated by a court of equity.

* * *

"The defendant Felz Motor Company bought the cars from the defendant Commercial Credit Corporation with full knowledge and consent of the plaintiff. * * *."

We find little, if any, dispute in the evidence as to the essential facts. The evidence discloses that upon the death of plaintiff's husband plaintiff employed Cusack as her attorney to handle her interests and the probate of her husband's estate. A careful check of the books and records of the Wenzel company, then made, established that the company had many creditors and would not be able to continue in business without additional capital. The finances of the company were fully explained to plaintiff in September, 1941. After consultation with her lawyer and others, plaintiff determined not to invest any new capital in the company and agreed with Cusack to liquidate the business of the company and dispose of all its assets. Cusack and plaintiff enlisted the aid of Commercial to secure a purchaser for the assets of the company. Commercial succeeded in interesting Felz, who conducted its sales agency business across the street from that of the Wenzel company. Many meetings were held with plaintiff present, between the representatives of Commercial, Felz and the Wenzel company. At a meeting held in Cusack's office on November 11, 1941, a written offer was submitted by Felz, which in detail described the assets sought to be purchased and the terms of purchase, including assumption of then existing leases held by the Wenzel company at five separate locations described in said offer. Each of the items listed in said offer was explained in detail to

plaintiff. The written offer included, among other things, the purchase of nineteen used automobiles for $1,000; $3,000 for all furniture, fixtures, equipment and personal property; and payment at invoice price for all Dodge, Plymouth, DeSoto and Chrysler parts, and other merchandise. The offer further provided that all new DeSoto and Plymouth automobiles and all used automobiles which had been or would be repossessed by Commercial would be foreclosed by them and sold to Felz or anyone designated by them; that possession of the Wenzel company premises was to be turned over to Felz on November 12, 1941, and all operating expenses and work in process would be pro-rated as of November 12, 1941. Felz reserved the right to withdraw the offer unless it was accepted or consummated on or before November 18, 1941. Plaintiff was advised at said meeting that Felz would not consummate the deal on any other basis, and it was explained to her that it was necessary for Commercial to repossess and foreclose so that Felz could acquire title through the foreclosure sale, free of any claim of creditors.

Plaintiff considered the matter for a few days and then advised Cusack that she agreed to the arrangement and directed him to proceed to consummate the agreement. A waiver of notice of the special meeting of the stockholders of the Wenzel company to be held November 18, 1941, at the place designated, was signed by plaintiff. She attended the meeting at the time and place called for in the notice and voted in favor of the resolution to accept the offer of Felz, directing plaintiff, as president, to execute a bill

of sale. A special meeting of the board of directors of the Wenzel company was held the same day, likewise approving the Felz offer and directing plaintiff, as president of the company, to execute a bill of sale. A bill of sale was executed by plaintiff, as directed.

Commercial then gave the Wenzel company, as well as plaintiff, written notice that it would on November 19, 1941, at the hour of 10:00 a.m., at the premises of Wenzel Automobile Sales Company, 1143 Diversey Parkway, sell at public auction, to the highest bidder for cash, all those goods and chattels listed on Schedule "A" attached thereto, and that it reserved the right to bid and purchase at said sale for cash or credit. The schedule attached to the notice listed each car, the make, the year, the serial and motor numbers, and the amount of thelien due on each car, and whether used or new. The sale was had pursuant to the notice, at the time and place designated, and a statement of the sale dated December 9, 1941, was furnished to the Wenzel company, as well as plaintiff. This statement showed the amount realized on each car at the sale and that the total realized was $56,398.45.

Bearing upon the question as to whether plaintiff was fairly dealt with by Felz, Cusack, and Commercial, the evidence further discloses that the offer made by Felz relieved the Wenzel company of an obligation of approximately $5500, represented by deposits made by customers on cars not delivered to them, and the liability of the Wenzel company

on the leases assumed by Felz. In addition to this relief of liability, plaintiff received in excess of $12,000 from the sale of the assets of the Wenzel company under the Felz offer and was paid a weekly salary of $100 by the Wenzel company during the summer and fall of 1941.

The master found, and the evidence supports the finding, that plaintiff is an intelligent person, a graduate of a business college; fully understood the transaction involving the liquidation of the Wenzel company, the repossession, foreclosure and sale by Commercial of the cars in question, and the significance of all the papers she signed to consummate the deal.

In the face of these detailed facts, she alleged in her complaint and testified upon the hearing that she did not understand the details of this transaction, and that Cusack, as her attorney, did not properly advise her as to her rights. It should be borne in mind, in this connection, the decree found that plaintiff's ignorance of her rights is only a unilateral mistake of either law or fact; that her counsel's advice is not chargeable to Commercial, and that Felz bought the cars from Commercial with full knowledge and consent of the plaintiff. The court having dismissed the complaint for want of equity as to the other defendants, from which decree plaintiff did not appeal, it is an adjudication, amply supported by the evidence, that there was no such conspiracy or fraud on the part of those defendants, as alleged in the complaint. It follows that Commercial, the remaining defendant, could not be a party to a conspiracy or fraud which did not exist.

In our judgment, a very clear case of laches and estoppel is made out against plaintiff. She did not bring Commercial into this action until December 24, 1947, a little more than six years after the repossession, foreclosure, sale, and report of sale given by Commercial to plaintiff. As already noted, she had proper notice of the sale, as provided in paragraph 171, section 6, subparagraph 3b of the Uniform Sales Act. Every opportunity was afforded her to bring others to the sale and to bid. The bidding was open to anyone present, and she consented, as the decree finds, to the arrangement previously made for the foreclosure and sale of the cars to Felz at invoice prices.

A pertinent inquiry in determining laches is whether the defendant has been prejudiced by the delay. The decree found that the records of Commercial were destroyed according to routine custom of its business, and they are no longer available. It should be obvious to anyone that to determine at this late date whether the amount realized on the sale of a used car was fair would depend upon many factors, including the mechanical condition of each car. The difficulty of such proof is equally obvious, and it does not appear that such proof is available.

Certainly, between the time of the sale, December 19, 1941, and the bringing of the action against Commercial by amendment to the complaint, filed December 24, 1947, she had every opportunity for inquiry as to the fairness or the alleged gross inadequacy of the price obtained for each car at the sale. She was fortified with the report of description of each car and the amount realized at the sale for each car.

In Stoke v. Wheeler, 391 Ill. 429, 438, it was said:

> "Although the general rule is that to charge a party with laches in the assertion of an alleged right it is essential that he should have had knowledge of the facts upon which he bases his claim, yet if the circumstances were such as to have put him upon inquiry and the means of ascertaining the truth were readily available had inquiry been made, the neglect or failure of the party to make such inquiry will charge him with laches the same as if he had known the facts. * * * The test is not what a party knows, but what he might have known by the use of information within his reach with the vigilance the law requires of him."

The court further said (p. 439):

> "The allegations of the complaint, as amended, and the testimony of plaintiff to the effect that he had no knowledge or suspicion of the alleged irregularities until shortly after the death of Francis E. May in 1942, under all the circumstances disclosed by this record, fall far short of the vigilance required by the law to absolve him from responsibility for the long delay in asserting his claim."

To the same effect is Jogger Mfg. Co. v. Addressograph-Multigraph Corp., 346 Ill. App. 1 (leave to appeal denied by the Supreme Court).

Plaintiff had consented to the sale of the cars to Felz, as the decree found, and accepted the benefits from the sale. Under all the circumstances disclosed, she should be estopped to make the instant claim against Commercial. In Thomas v. 4145 Broadway Hotel Co., 342 Ill. App. 308, 317, a case of a complaining stockholder against trustees in a voting trust agreement, this court said:

> "We further find that plaintiff is estopped by laches, acquiescence and acceptance of the benefits of the continued existence of the stock trust after May 1, 1945. The extension amendment was declared effective December 28, 1944. Yet plaintiff waited until May 16, 1947 to institute his suit challenging the validity of the amendment."

Plaintiff, appealing to a court of equity, should not be permitted to sleep upon her rights for more than six years, to the substantial disadvantage of defendant, where no fraud is proven and no fiduciary relation exists.

One must not be misled by the designation in the Uniform Sales Act of the parties to the trust receipts as trustor and trustee. That designation does not create a fiduciary relation in the ordinary acceptation of the term, no more than does the designation in the statute of mortgagor or mortgagee in a mortgage on real or chattel property. In essence the relationship of the parties under the statute in question is no different than that of vendor and vendee in a conditional sales contract, or mortgagor and mortgagee. The Act is intended to give the trustor a lien upon the chattels and choses in action and an opportunity for repossession and sale without the necessity of proceedings in court for the foreclosure of the lien.

Concluding, as we do, that plaintiff is guilty of laches, we deem it unnecessary to consider other questions argued upon this appeal.

Accordingly, the decree of the Superior Court is reversed and the cause remanded with directions to enter a decree overruling plaintiff's exceptions to the master's report as to Commercial and dismissing the complaint for want of equity as to Commercial.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE, P.J. AND KILEY, J., CONCUR.

174 A

45887

OSCAR W. KADDATZ, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
JOHN STEVENS, Appellant.	)	OF CHICAGO.

350 I.A. 260[2]

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action on a promissory note. Judgment was confessed but was opened on defendant's petition, charging forgery and no indebtedness. The petition stood as an answer, the court heard the issues without a jury, and entered judgment for $18,536.27. Defendant has appealed.

Defendant has been a real estate broker in Chicago since 1911. Plaintiff is the indorsee of the note sued on. The indorsers were Meta and Charles Jarchow, plaintiff's sister and her husband, the payees named in the note. In 1928, defendant sold the Jarchows a $4,500 mortgage. The note was made by the defendant and his wife and was secured by improved Chicago property. In 1929 and 1930, he sold them 4 mortgages aggregating $12,150. The mortgage notes were due one year after date and were secured by trust deeds of vacant Chicago properties. No interest or principal was paid on the mortgages on the unimproved property.

In October, 1942, defendant signed a 6% promissory note for $12,150 payable to the Jarchows. Contemporaneously, he made a written agreement with them under which they held the four mortgages on unimproved property as security for the payment of the $12,150 note. The note was not paid.

Plaintiff obtained judgment by confession on a note for $12,150 bearing the signature "John Stevens" as maker. The issues of fact at the trial were whether the signature on the note in suit was defendant's signature and whether the note represented a debt or was an accommodation. Defendant contends the findings against him on these issues are against the manifest weight of evidence.

The defense of forgery was an affirmative defense, the burden of which defendant assumed at the trial. His testimony was that the attorney for the Jarchows induced him to sign a $12,150 note and agreement by telling him that Mrs. Jarchow was not well and was nervous about the security and that defendant should sign the papers to compose her; that he signed the agreement and a 6% note dated October 1, payable to Jarchows for $12,150; that he made no payments on the note since it was merely an accommodation; that "two or three years" later Charles Jarchow returned the note to him and it was destroyed; that he "never asked for the mortgages back"; and that the note in suit was not the one he signed.

He testified also that the four mortgages mentioned in the security agreement were "worthless"; that he had given Meta Jarchow one hundred dollars on two occasions at Christmas when she asked for "a little money", and also gave plaintiff $50.00 at the time of the death of Charles Jarchow; and that these were not payments on the note but friendly repayments of favors done him by them during depression.

Defendant had sold notes to the mother of plaintiff and Meta Jarchow before the time of the instant transaction. He wrote the mother a letter in 1923 which purported to "guaranty" interest and principal, "in other words, the only thing you have to do, when due, is to bring the notes into the office and you will get your check." He was trustee of one of the "worthless" mortgages. He witnessed the will of Charles Jarchow in 1928. He drew a will in 1946 for Meta Jarchow, naming himself, his daughter and plaintiff contingent co-beneficiaries and co-executors. In 1930, defendant delivered to Meta Jarchow a "ten days" note, payable to her for $2,832.50. In 1938, he delivered a "fifteen days" note for $340 to plaintiff, payable to plaintiff.

The attorney who represented Jarchows in the October, 1942 transaction testified that when the note was delivered to him, he gave defendant the $4,500 Stevens note. Defendant receipted for this note on a sheet of paper bearing the attorney's name. The attorney denied discussing the illness of Mrs. Jarchow or "accommodation" papers, and said that what "brought him in" was that some of the mortgages defendant had sold had "gone bad" and some were not first mortgages. This witness could not identify the note in suit as the one delivered to him by defendant. He said that at the time he turned the note given him over to his associate who represented plaintiff at the trial.

Meta Jarchow testified that she received the note in suit in October, 1942 from the attorney who represented her at the trial; that she and her husband requested defendant

to pay the note and he said he had no money; that the Christmas payments by the defendant were upon the note in suit; and that the $4,500 Stevens note was given defendant when he asked for it in exchange for the $12,150 note. Defendant in rebuttal denied the Jarchow request for payment on the note. He said they came to him to look after their affairs, had confidence in him, and knew what they were buying when they bought the mortgages.

A handwriting expert testified for defendant that it was his opinion that the note in suit was not signed by the same person who signed the several other signatures on defendant's exhibits which are admittedly the defendant's. Another handwriting expert testified for plaintiff that the signature on the note and the signatures admittedly defendant's on the several plaintiff exhibits were written by the same person. Included in plaintiff's exhibits was a copy of the enlarged series of defendant's admitted signatures listed under the disputed signature. Plaintiff's expert attributed the most conspicious deviation, from the admittedly genuine, in the disputed signature to the deliberate effort of the person signing his own name.

We have examined the exhibits and compared them and can not say that the court's finding that the defendant signed the note in suit is against the manifest weight of the evidence.

In view of the relationship of defendant and Meta Jarchow we cannot say the trial court should have rejected as inherently improbable her testimony that she had kept the note in a vault from October, 1942 until March, 1950 without

taking action. The same conclusion holds for the testimony of plaintiff's expert that the signature on the note was deliberately distorted. In the context of all the circumstances in this case, the latter testimony is not necessarily against the common experience of mankind.

There is an admitted error in computing the interest which was included in the judgment. The trial court computed interest from the date of the note instead of its maturity. The judgment should have been for $17,807.27 and judgment is hereby entered in this court for that amount.

For the reasons given the judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

LEWE, P.J. AND FEINBERG, J. CONCUR.

178 A

45888

350 I.A. 261

PATRICK E. O'MALLEY, Appellee,	)
v.	) PETITION FOR LEAVE TO APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
CHICAGO WOOD & COAL CO., a corporation, Appellant.	)

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint against defendant for personal injuries and property damage sustained in an automobile accident that occurred at the intersection of Augusta boulevard and Keystone avenue, in Chicago, Illinois. At the close of plaintiff's case and at the close of all of the evidence defendant moved the court for a directed verdict which was denied. The cause was submitted to a jury and a verdict returned finding the defendant not guilty. Plaintiff filed a motion for a new trial which was allowed by the trial court. Defendant filed a petition for leave to appeal, which was allowed by this court.

The trial court in its orders granting a new trial does not indicate the ground or grounds upon which the motion was allowed. Plaintiff's motion sets forth six grounds. Where a motion for a new trial is granted, the trial court should set forth the ground or grounds upon which a new trial was granted so that the reviewing court can determine the merit of the issues raised by the appeal. Gavin v. Keter, 278 Ill. App. 308; Couch v. Southern Railway Co., 294 Ill. App. 490.

It is apparent from the record and defendant's petition for leave to appeal that its principal contentions in asking this court to set aside the trial court's order are (1) that the plaintiff was guilty of contributory negligence as a matter of law; (2) that the jury having decided in favor of the defendant, the trial judge had no right to interfere with the verdict because he could not say that it was against the clear preponderance or manifest weight of the evidence.

To decide the issues we must summarize the parts of the record that are pertinent. The accident occurred at the intersection of Keystone avenue and Augusta boulevard in Chicago, Illinois, at about eight o'clock in the morning on November 18, 1948, when a coal truck operated by the defendant and an automobile operated by the plaintiff collided. An employee of the defendant was driving the truck north on Keystone avenue and plaintiff was driving west on Augusta boulevard which is a four lane east and west street. The truck was loaded with ten tons of coal so that the top of it stood about ten or twelve feet above the street level. In addition to the driver of the truck, there was a helper who sat alongside of him. At the trial, the truck driver stated that when he came to the intersection of Augusta boulevard, at which stop signs are posted, he saw that Keystone avenue was blocked by eastbound traffic which was standing still two lines deep on the south side of Augusta boulevard. He brought the truck

to a complete stop at the south crosswalk of the intersection and waited until the automobiles blocking the intersection created an opening to permit his passage across the boulevard. Before he started he said he could see over the tops of the standing vehicles about sixteen feet on Augusta boulevard. Plaintiff's automobile was not in sight. He proceeded slowly between the two lines of eastbound vehicles at about four to five miles an hour and was sounding his horn. Just before he reached the westbound lane of Augusta boulevard his visibility was reduced to a distance of three feet and plaintiff was not within that range. He first saw the plaintiff when he was about a foot and a half over the center line dividing the east and westbound traffic of Augusta boulevard. Plaintiff was riding very close to the white line dividing the east and westbound traffic. He immediately applied his brake and the collision took place.

There is a dispute as to whether plaintiff's car struck defendant's truck or defendant's truck struck plaintiff's car. There is a variance between certain statements made by defendant's driver in a pre-trial deposition and testimony given at the trial. In his pre-trial deposition, he stated that he did not see plaintiff before the impact; while at the trial he said he saw plaintiff's car three or four feet before the impact took place. He further stated in the pre-trial deposition and in a statement to the police that he hit the plaintiff, while at the trial he said the

plaintiff hit his car. He also stated to the police that at the time of the impact he was driving at about five miles per hour, while at the trial he stated he was standing still. The helper, who was riding alongside defendant's driver at the time of the collision, substantially corroborated the driver, except that he stated as they stopped near the crosswalk he could see about 35 feet east on Augusta boulevard and when they were near the center line dividing traffic on the boulevard he could see all the way to Crawford avenue, which was one block east.

Plaintiff testified that before the collision there were no cars directly ahead of or alongside of him going in the same direction. The condition of the eastbound traffic was very congested for approximately two blocks west of Crawford avenue. As he approached Keystone avenue, he was traveling four feet north of the center line. He first saw the defendant's truck when both were about fifty feet from the intersection. The truck was moving in a northerly direction at the time. After seeing the truck, he looked straight ahead and proceeded west on Augusta boulevard. He was about 25 feet from the intersection when he again glanced to the south and noticed the truck 25 feet from the boulevard. He was traveling at about fifteen miles an hour. As he came to the intersection, he heard a roar of a motor and looked up and saw the truck of defendant about five feet from the side of his car. The front of the truck came in contact with the left part of his car. Both vehicles were stopped

dead by the impact.

The question of whether plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104; Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 Ill. 630; O'Rourke v. Sproul, 241 Ill. 576; Bales v. Pennsylvania Railroad Co., 347 Ill. App. 466. Applying the facts to this statement of law and after considering the inconsistencies in the testimony of the witnesses for the defendant, we cannot say that all reasonable minds would reach the conclusion that there was contributory negligence as a matter of law.

The principle of law is thoroughly established that motions for new trial are addressed to the sound discretion of the trial judge. He has seen the parties, their witnesses and counsel before him. He has had the opportunity to observe their demeanor and conduct during the trial, and where there is a dispute as to the facts, his action will not be reversed except in case of clear abuses of discretion. Lepkowski v. Laukemper, 317 Ill. App. 304; Couch v. Southern Railroad Co., 294 Ill. App. 490; Tone v. Halsey, Stuart & Co., Inc., 286 Ill. App. 169; Gavin v. Keter, 278 Ill. App. 308.

We have carefully considered the facts, and while it is a close question, we have reached the conclusion that we would not be justified in substituting our opinion for that of the trial judge. The order of the trial court is affirmed.

Order affirmed.

Schwartz and Tuohy, JJ., concur.

179 A

46070

350 I.A. 262

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO MUNICIPAL
v.	)	COURT OF CHICAGO.
FRED DE PAULO, Plaintiff in Error.	)	

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

In this case plaintiff in error was convicted by the Municipal Court of Chicago of a violation of the Uniform Narcotics Drug Act, Ill. Rev. Stat. 1951, chap. 38, par. 192-2, as amended, for unlawfully having in his possession heroin, a certain habit-forming drug. This was his first offense. He was sentenced to serve a term of one year in the House of Correction of the City of Chicago.

As in case No. 46069, People of the State of Illinois, Defendant in Error, v. Robert O'Connor, Plaintiff in Error, this case was transferred to this court for review for the same reasons set forth in that opinion. The decision in the O'Connor case is controlling and decisive in this case. The judgment of the Municipal Court of Chicago is accordingly affirmed.

Judgment affirmed.

Schwartz and Tuohy, JJ., concur.

180 A

46071

350 I.A. 262

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO MUNICIPAL
v.	)	COURT OF CHICAGO.
HARRY MIMS, Plaintiff in Error.	)	

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

In this case plaintiff in error was convicted by the Municipal Court of Chicago of a violation of the Uniform Narcotics Drug Act, Ill. Rev. Stat. 1951, chap. 38, par. 192-2, as amended, for unlawfully having in his possession heroin, a certain habit-forming drug. This was his first offense. He was sentenced to serve a term of five years in the House of Correction in Chicago and pay a fine of $5,000.

As in case No. 46069, People of the State of Illinois, Defendant in Error, v. Robert O'Connor, Plaintiff in Error, this case was transferred to this court for review for the same reasons set forth in that opinion.

While the fine and penalty in this case is unusually severe, we have no alternative but to hold that our previous decision in the O'Connor case is controlling and decisive in this case. The judgment of the Municipal Court of Chicago is accordingly affirmed.

Judgment affirmed.

Schwartz and Tuchy, JJ., concur.

3433 A

ABSTRACT

Gen. No. 10658 Agenda No. 15

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1953

350 I.A. 263

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	Writ of Error to
vs.	)	Circuit Court of
FRANK GROVER, Plaintiff in Error.	)	DuPage County.

Anderson -- J.

Frank Grover, plaintiff in error, hereinafter referred to as the defendant, and five other persons, were jointly indicted for the crime of conspiracy in the Circuit Court of DuPage County, Illinois.

The defendant first made a motion to quash the indictment alleging that the indictment did not charge a criminal offense. Prior to a hearing the defendant withdrew this motion and on arraignment, being represented by an attorney, pleaded guilty to the crime of conspiracy as charged in the indictment and was sentenced to the penitentiary for a term of not less than one year nor more than three years. The defendant sued out a writ of error to the Supreme Court to review the proceedings. They held that they had no jurisdiction and pursuant to the Statute transferred the cause to this Court. The record to be reviewed consists of the common law record only. The defendant appears in this Court pro se.

The defendant assigns as error that the grand jury that returned the indictment was not legally assembled or constituted, that the indictment did not charge an offense or crime under the conspiracy statute, and that the punishment imposed was excessive.

Dec. 5th, 1893 — Decd. No. 13

THE STATE OF OHIO,

vs.

FRANK DOWNS.

Indictment in error, to Circuit Court of Hocking County.

Indictment -- 1.

Frank Downs, plaintiff in error, brought into Court to try the indictment, and filed other motions, was jointly indicted for the crime of conspiracy in the Circuit Court of Hocking County, Ohio.

The defendant filed such a motion to quash the indictment, alleging that the indictment did not charge a criminal offense. Prior to hearing the defendant withdrew this motion and in consideration, being represented by an attorney, pleaded guilty to the crime of conspiracy as charged in the indictment and was sentenced to the penitentiary for a term of not less than one year nor more than three years. The defendant sued out a writ of error to the Supreme Court to review the proceedings. They held that they had no jurisdiction and remanded to the Circuit transferred the case to this Court. The record to be reviewed consists of the bill of the person has record only. The defendant appears in this Court pro se.

The defendant assigns as error that the grand jury that returned the indictment was not legally assembled or constituted, that the indictment did not charge an offense or crime under the conspiracy statute, and that the punishment imposed was excessive.

It is the settled law in this State that all irregularities concerning the assembly of a grand jury are waived unless the defendant in apt time raises the question by motion to quash the indictment challenging the array. (People vs. Leiber, 357 Ill. 423; People vs. Knox, 302 Ill. 471.)

It is also the established law in this State that technical objections as to the form of the indictment are waived by the defendant where he has made no motion to quash the indictment. (The People vs. Pond, 390 Ill. 237; People vs. Glassberg, 326 Ill. 379.) No motion to quash the indictment is disclosed by the record in this case.

Defendant contends that it cannot be ascertained from the record who the members of the grand jury were. An examination of the proceedings concerning selection and empanelling of the grand jury in the instant case discloses no irregularities of any kind. The record discloses that the grand jury and alternate grand jurors were lawfully summoned, that five members of the regular grand jury did not appear, that five members of the alternate list of grand jurors were chosen to act, that a foreman was appointed who was sworn, that the remainder of the grand jurors were duly sworn and were then charged by the Court as to their duties. From the above it is clear that the clerk's record discloses the names of the grand jury that were empanelled and sworn. There was no challenge to the array or motion to quash the indictment on the grounds that there was not a legal grand jury. If there had been, it would have had no merit. The record shows a strict compliance with the Statute in the organizing of the grand jury. (People vs. Dear, 286 Ill. 142.) There is no merit to defendant's contention that the grand jury was not legally assembled or constituted.

The next alleged error to consider is, does the indictment charge a criminal offense. If it does, the defendant's plea of guilty is an admission of every fact properly alleged in the indictment. (People vs. Conn, 391 Ill. 190.) If the indictment does not charge a criminal offense, the plea of guilty does not admit that the indictment charges a criminal offense by

It is the settled law in this state that all irregularities concerning the assembly of a grand jury are waived unless the defendant in a criminal action raises the question by motion to quash the indictment challenging the array. (People vs. [illegible], 327 Ill. 447; People vs. Lee, 326 Ill. 434.)

It is also the established law in this state that individual challenges to the legal qualifications of the individual jurors who actually sit on the indictment are waived unless the defendant makes the motion to quash the indictment. (People vs. Thal, 340 Ill. 177; People vs. Simmons, 326 Ill. 177.) In order to quash the indictment it is disclosed by the record in this case.

Defendant contends that it cannot be ascertained from the record that the members of the grand jury were. An examination of the proceedings concerning selection and qualification of the grand jury in the instant case disclosed no irregularities of any kind. The record shows that the grand jury and alternate grand jurors were lawfully summoned, that the members of the regular grand jury did not appear, that the sheriff's return of the alternate list of grand jurors were shown to be, that a fresh venire was issued and the sheriff's return of the grand jurors were duly issued and were then charged by the court as to their duties. Then the above is to the fact that the sheriff's record discloses the names of the grand jury that were summoned and sworn. There was no challenge to the array or motion to quash the indictment on the grounds that there was not a legal grand jury. If there had been, it would have had no merit. The record shows a strict compliance with the statute in the organizing of the grand jury. (People vs. Sam, 236 Ill. 164.) There is no merit to defendant's contention that the grand jury was not legally assembled or constituted.

The next alleged error to consider is, does the indictment charge a criminal offense. If it does, the defendant's plea of guilty is an admission of every fact properly alleged in the indictment. (People vs. Sam, 291 Ill. 120.) If the indictment charges a criminal offense, the plea of guilty does not admit that the indictment charges a criminal offense by

statute or at common law. This question can be raised by the defendant at any time in the trial court or by writ of error. (People vs. Fore, 384 Ill. 455; People vs. Lantz, 387 Ill. 72; People vs. Pond, 390 Ill. 237.)

The indictment in the instant case is based upon Ill. Rev. Stat., chap. 38, sec. 139. This Statute provides "... if any two or more persons conspire or agree together ... to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice ... they shall be deemed guilty of a conspiracy and every such offender ... convicted of conspiracy at common law shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding $2000.00, or both."

The indictment consisting of one count charged that the defendant and five other persons "unlawfully, feloniously, wilfully and fraudulently, did combine, conspire and agree together, and with each other, with the fraudulent intent, wrongfully and wickedly to injure the administration of public justice, by then and there unlawfully and fraudulently, to set at liberty one Kenneth Factor, who was then and there lawfully detained and committed to the common jail of Du Page County and in the custody of Rollin M. Hall, Sheriff of DuPage County, in the County of Du Page and State of Illinois, as aforesaid,"

The indictment charged the defendant with conspiring to commit an illegal act and then recited what the illegal act was. If the indictment for conspiracy informs the defendant of the nature of the offense, in the language of the Statute, that is sufficient, and it is not necessary to allege the means by which the illegal act is to be accomplished, as a conspiracy to do any illegal act is a crime. (People vs. Glassberg, supra; Cole et al vs. The People, 84 Ill. 216.)

In the case of People vs. Tilton, 357 Ill. 47, two defendants were indicted for conspiracy for practicing medicine without a license. The indictment was based on the same section of the criminal code as appears here. The indictment charged that the defendants did not possess licenses to practice

statute or at common law. This provision has to relate to the indictment in any case in the trial court or by writ of error. (People v. Lane, 3 Ill. 112. 55; People v. Lamb, 207 Ill. 77; People v. Jones, 290 Ill. 432.)

The "element" in the instant case is based upon Ill. Rev. Stat., chap. 38, sec. 150. This statute provides "... if any two or more persons conspire or agree together ... to do any illegal act injurious to the public health, morals, welfare, or public convenience or public justice ... they shall be guilty of a conspiracy, and shall suffer ... punishment of imprisonment in county jail or penitentiary not exceeding five years, or fined not exceeding $2,000.00, or both."

The indictment charges that the defendant and five other persons "unlawfully, feloniously, willfully and knowingly did combine, conspire and agree together, and with each other, with the intent to injure, wrongfully and wrongfully to injure the administration of public justice by their and their unlawful and corrupt efforts, to get an injury and forgery, who was then and there lawfully charged and committed to the county jail of the Fifty Twenty and in the custody of Willie S. Smith, Sheriff of Madison County, in the County of Madison and State of Illinois, to escape." The indictment charges the defendant with conspiring to commit an illegal act and then recited that the illegal act was. If the indictment for conspiracy informs the defendant of the nature of the charge, in the language of the statute, such is sufficient, and it is not necessary to allege the means by which the illegal act is to be accomplished, or to specifically be the illegal act in a crime. (People v. Blackburn, supra; Cole et al. v. The People, 75 Ill. 518.)

In the case of People v. Gilson, 327 Ill. 17, the defendants were indicted for conspiracy for prostituting and debauching a woman. The indictment was based on the same section of the criminal code as applied here. The indictment charged that the defendants did unlawfully and corruptly

medicine as required by law and that they conspired with others to practice medicine which was illegal and injurious to the public health. A motion to quash the indictment was overruled by the trial court and was sustained, and the conviction of the defendants was affirmed by the Supreme Court. The Supreme Court held that the indictment, in the language of the Statute, was sufficient and charged a crime under the conspiracy Statute. The Court says on page 49 of the opinion: "... A criminal conspiracy at common law may involve either the doing of an unlawful act by any means or any act by unlawful means and this count properly charges a common law conspiracy."

This case is nearly parallel to the instant case, the only difference being that one involved an illegal act against public health and the other against the administration of public justice.

The case of Cole et al vs. People, 84 Ill. 216, concerns the validity of an indictment for conspiracy charging that the defendants were conspiring to injure the administration of public justice by fraudulently attempting to obtain and procure a decree of divorce in the superior court of Cook County. The Court said that the indictment clearly set forth the nature of the unlawful act alleged to have been committed against the administration of public justice and charged a crime. The conviction of the defendants based on this indictment was sustained.

Chapter 38, par. 220 of the Criminal Code provides that any person who aids or assists a prisoner to escape from an officer who has his lawful custody shall be guilty of a misdemeanor and may be punished by confinement in county jail not exceeding one year or fined not exceeding $1000.00, or both.

It is therefore clear in the instant case that under the law the indictment properly charged the defendant with the crime of conspiracy. The defendant's contention that it did not do so is without merit.

The defendant lastly contends that the punishment imposed was excessive. His argument is that his punishment for conspiracy was more than if he had been convicted for aiding or assisting the prisoner to escape. This is true,

but his contention that the punishment is excessive is without merit. Whatever we may think about the punishment, if the punishment imposed by the trial court is within the limits prescribed by the Statute, it cannot be judged to be excessive. In People vs. Dudgeon, 341 Ill. App. 533, this Court had before it a like contention. We there said on page 542 of the opinion:

> "In People vs. Smith, 245 Ill. App. 119, the court cited People v. Elliott, 272 Ill. 592, and held that if a statute is not in violation of the Constitution, then any punishment assessed by a court or jury within the limits fixed thereby cannot be adjudged excessive, for the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power but a legislative one, and on page 123 of the opinion, the court says: 'So far as we are advised, our Supreme Court has never reduced nor has it directed a trial court to reduce a sentence already within the limits of the statute in order that it might conform to the views of that court as to what punishment should have been inflicted. In the absence of such a decision, we do not feel warranted in interfering with the discretion conferred by the statute upon the trial court.'"

As the punishment imposed was within the limits of the Statute, we are bound by it and defendant's contention that the punishment was excessive is without merit.

For the above reasons, it appearing from a careful examination of the record that the judgment of the trial court is sustained by the law and the record, its judgment must be and is affirmed.

Judgment affirmed,

but the contention that the punishment is excessive is without merit. Whatever we may think about the punishment, if the punishment imposed by the trial court is within the limits prescribed by the Codes, it cannot be argued to be excessive. In People vs. Dungan, 71 Cal. App. 327, this Court had before it a like contention. We quote and adopt on page 334 of the opinion:

> "In People vs. Smith, 147 Cal. 686, 82 Pac. 324, the court stated (citing People v. Wilson, 139 Cal. 332) not particularly in a similar to our statutory law of the Territories, that any punishment authorized by a statute is not in fact cruel and unusual, and that the Legislature alone can determine what punishment should be inflicted upon the person who violates the law. In the case at bar the defendant, by violating part the penal statutory provisions, has brought himself within the operation of a statute which provides a punishment for the crime of which he has been convicted, and it is therefore a duty imposed on the judiciary to impose a sentence allowed by the statute of the territory in which the crime was committed, and the courts have no authority to alter such sentence or to substitute a lesser punishment than that which the statute has prescribed. In the instance of such a prohibition, we do not feel what would be labor-saving when the Legislature, interpreted by the courts upon the trial of cases."

In this particular instance the sentence was within the limits of the Codes, so it cannot be said by us that defendant's contention that the punishment was excessive, is without merit.

For the above reasons, the judgment from a verbal modification of the record from the judgment of the trial court to accordance by the law and the record, the judgment must be and is affirmed.

Judgment affirmed.

34431

A

Abstract

Gen. No. 10669 Agenda No. 22.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT 350 I.A. 263

FEBRUARY TERM, A. D. 1953.

DONALD C. ALLENSWORTH, Plaintiff-Appellant vs. THE FIRST GALESBURG NATIONAL BANK AND TRUST COMPANY (a Corporation) PRINCIPAL for Galesburg Glass Co., Thos. H. DuJardin, Walter E. Brown, Ila Algren & Clifford Algren, Gus C. Pahlow & Victor Casket Hardware Company (a Corporation.) Defendants-Appellees.	Appeal from Circuit Court, Knox County.

PER CURIAM:

Donald C. Allensworth filed his complaint in the Circuit Court of Knox County, Illinois, against the defendants, The First Galesburg National Bank & Trust Company, a corporation, Principal for Galesburg Glass Company, Thos. H. DuJardin, Walter E. Brown, Ila Algren and Clifford Algren, Gus C. Pahlow and Victor Casket Hardware Company, a corporation, for a writ of forcible entry detainer for certain described property, in Galesburg, Knox County, Illinois. Later the plaintiff filed a motion for summary judgment for the possession of this

Appeal from

Dec. 21, 1900. ..... Appeal No. 21.

In the

Appellate Court of Illinois

Sixth District

October Term, A. D. 1900.

DONALD G. ALDERWOOD, Plaintiff-Appellant, vs. THE FIRST CALUMET NATIONAL BANK AND TRUST COMPANY (a Corporation) TRUSTEE FOR Salomon Klaus Co., Inc. G. Jackson, Walter E. Kern, Ira Clemes & Charles Alcorn, Jos. C. Valow & Joseph Central Industrial Company (a Corporation). Defendants-Appellees.	Appeal from Circuit Court, Cook County.

MR. COURT:

Donald G. Alderwood filed his complaint in the Circuit Court of Cook County, in trust, against the defendants, the first mentioned defendant being a trust company, a corporation, trustee for Salomon Klaus Company, Inc., G. Jackson, Walter E. Kern, Ira Clemes and Charles Alcorn, Jos. C. Valow and Victor Daniel Industrial Company, a corporation, for a writ of replevin and injunction for certain described property, in Calumet, Cook County, Illinois. Later the plaintiff filed a motion for summary judgment for the possession of this

property. The defendants entered a motion to strike the complaint, because it did not state a cause of action and further, because the rights of the parties had been heretofore adjudicated both by the Circuit and Appellate Courts of Illinois. The Court sustained the motion of the defendants, and refused to grant the plaintiff summary judgment on his pleadings. Later the plaintiff filed a motion in the Circuit Court of Knox County to set aside both of these orders. The motions were both overruled by the Court. The plaintiff, Allensworth, has perfected an appeal to this Court.

The first order of the Court after the caption of the suit is as follows: "In open court on this day, to-wit: September 16th, 1952 the Court now has hearing on the plaintiff's motion for summary judgment herein, and the Court after being fully advised in the matter and after due consideration thereof, denies said motion; the Court also has hearing on the defendants' motions to strike the complaint, and after being fully advised thereon and after due consideration thereof, the defendants' motions to strike the complaint are hereby allowed by the Court as to First Galesburg National Bank and Trust Company, a corporation and also as to Thomas H. DuJardin and Walter E. Brown, Partners, doing business under the name of Galesburg Glass Co., and the same is so entered by the Court accordingly." It is from these two orders that the appeal has been prosecuted to this Court. Our Statute provides that, "Appeals shall lie to the Appellate or Supreme Court, in cases where any form of review may be allowed by

property. The Saturnian assumed a variety of shapes and complexions, because it did not affect a union of action and interest, because the minds of the settlers had been insufficiently adjusted into by the circumstances and exploiting powers of Illinois. The Court examined the decision of the Commission, and refused to accept the validity of another judgment on the plaintiff. Under the statutory Illinois decision in the circuit court issue of fact depends, to and which both of these courts. The decision here was reversed by the Court. The validity illegalness, has potential as appeal to this Court.

The first action of the Court after the decision of the case is as follows: "If the Court in this day, [illegible] Supreme Court, [illegible] the court on the decision on the plaintiff's action for recovery judgment herein, and the Court after being duly advised in the premises and after the aforementioned thereof, finding well [illegible] the Court also has jurisdiction in the [illegible] matters to which the complaint, and after being fully advised herein and after the [illegible] evaluation thereof, the Commission's decision is quite the [illegible] and decision affirmed in the court as to the [illegible] national [illegible] and Trust Company, a corporation and also as to Thomas G. Pendell and Walter A. Innes, Partners, doing business under the name of Pendell Glass Co., and the same is so entered by the Court accordingly." It is from these two orders that his appeal has been presented to this Court. The pleading [illegible], "Appellee shall [illegible] the Supreme Court, in cases where any fact of involve may be allowed by

law, to revise the final judgments, order or decrees of the Circuit Court." etc.

It is stated in the opinion of the Court in Orwig vs. Conley, 322 Ill. 291, that the requirements of a final appealable order, decree, or judgment are as follows: "There must be a final decision of the case before either party can have it reviewed by a court of appeals,--i.e., there must be such a decision as settles the rights of the parties respecting the subject matter of the suit and which concludes them until it is reversed or set aside. * * A final judgment reviewable by appeal or error, within the meaning of the statute, is one which finally disposes of the rights of the parties either upon the entire controversy or upon some definite and separate branch thereof." To the same effect is Rogers vs. Barton, 375 Ill. 611 and Groves vs. Farmers State Bank, 368 Ill. Page 35, as these cases hold and this Court also has many times held, that unless there is a final judgment or decree of the lower Court, we are without jurisdiction to entertain the appeal. The defendants have filed briefs in this case in which they disclaimed any right to the property, as they claim that the title to the property has been adjudicated in several former suits. There is probably merit in this contention, but since there is no final or appealable order entered in the lower Court, this Court is without jurisdiction to entertain the appeal, and the appeal is accordingly dismissed.

Appeal dismissed.

law, to review the final decisions, orders or decrees of the District Court." etc.

It is stated in the opinion of the Court in Irvin vs. Dowler, 122 Ill. 274, that the requirements of a final appealable order, decree, or judgment are as follows: "There must be a final decision of the case before either party has leave to appeal by a court of equity,--i.e., there must be such a decision as settles the rights of the parties concerned, the subject matter of the suit and which would be that which if it is reversed or set aside, ... A final judgment contemplates by appeal or error, either the termination of the proceed, in the main, finally disposes of the subject matter of the suit upon the merits of the controversy, or upon some matter collateral and separate from the main controversy." In the case cited in Jordan vs. Burton, 175 Ill. 111 and Gowen vs. Harvey, 146 Ill. 148 Ill. 34, as these cases well and this court also has many times held, that unless there is a final judgment or decree of the lower court, we are without jurisdiction to entertain the appeal. The defendants have filed motions in this case in which they significant our right to the recovery, as they ask in that the title to the property has been adjudicated in previous Chancery suits. There is probably merit in this contention, but since there is no final or appealable order entered in the lower court, this court is without jurisdiction to entertain the appeal, and the appeal is accordingly dismissed.

Appeal dismissed.

186 A

45851

350 I.A. 317

O. W. LINDBERG, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
L. V. BRANDT and ALICE C. BRANDT, Appellees.	)	OF CHICAGO

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On April 5, 1949 plaintiff and defendants entered into a written contract providing that plaintiff should construct a house for defendants at 6000 North Kilpatrick avenue in Chicago, at a stipulated price of $32,875.00. Plaintiff claimed as authorized extras the additional amount of $2026.57. He had received as payment on account the total sum of $29,293.00, leaving a balance due and owing, as he claimed, of $5608.57, for the recovery of which he brought suit in the Municipal Court. The defense interposed was that plaintiff's workmanship was inferior, and, in a countersuit, defendants claimed damages in the sum of $25,000.00. The two cases were consolidated and heard as one. Judgment was entered in favor of plaintiff in the reduced amount of $1350.00, from which he has taken an appeal. No order was entered on defendants' statement of claim and plaintiff's answer thereto until after notice of appeal and notice of cross-appeal had been filed by both parties, and then a judgment was entered in that case for plaintiff, from which a cross-appeal was filed.

Plaintiff substantiated his claim by competent proof, showing that carpentry extras, plastering, landscaping and

other items aggregated $2026.57. Defendants alleged damage to their furniture, furnishings and personal effects. They had moved into the basement of the house on November 2, 1949, when the building was not yet ready to be occupied; the doors and windows had not been installed, and water stood in the basement to a depth of several inches, the result either of a closed-up drain or the backing up of the district sewer system. At that time workmen were engaged upstairs in plastering, painting and sanding, and the house was not completed and ready for occupancy until December 1949. The contract is silent as to a required completion date. In the circumstances, defendants contend that such date may be furnished by parol evidence, but the law is well settled that the intention of the parties to, and the meaning of, a contract are deduced from the language and the contents of the contract, and, where the terms are plain and unambiguous, the contract is conclusive. 17 C.J.S. Contracts §296. "The doctrine is too well settled to require discussion, that parol evidence was inadmissible to fix the time when the contract was to be performed. A contract can not rest partly in writing and partly in parol. But it results by legal implication, from the terms of the contract, that the performance is to be within a reasonable time. Where no time for performance is mentioned this is the legal conclusion." Driver et al. v. Ford et al., 90 Ill. 595. When parties deliberately reduce their agreements to writing, parol evidence is not admissible to vary or augment the writing, unless it is in some manner ambiguous

or requires further construction. Gronowski v. Jozefowicz, 291 Ill. 266; Sallo v. Boas, 327 Ill. 145; and Schoen-McAllister Co. v. Oak Park Nat. Bank, 349 Ill. App. 500. If defendants had desired to fix a date for completion, it could easily have been inserted in the agreement. With no performance date mentioned in the contract, plaintiff was required only to complete construction within a reasonable time. In moving into the basement before the building was ready for occupancy, defendants assumed all risk for the damages they claimed.

In addition to the damages claimed to their personal property, defendants contend that they paid rentals in the sum of $500.00 for the house previously occupied by them during the period of alleged delay, which amount was allowed by the court. Defendants were not entitled to recover this sum inasmuch as the contract did not provide for any specific completion date. Moreover, had there been a completion date and a breach thereof by plaintiff, the true measure of damages for failure to complete the building on time, if time had been the essence of the contract, would be the amount of rental value for said building during the period of delay; but defendants introduced no evidence of rental values.

In determining the various items of damage, the court gave defendants $3500.00 credit, which included miscellaneous items. There was a drain omitted in the garage, although called for in the plans and specifications. The Portage Park Plumbing Company installed the plumbing

and should have installed the drain. Lundsburg Construction Company poured the cement over the floor; it stated that no drain had been placed there by the plumber. It also poured the cement foundation walls that later developed cracks. Each of these parties received payment in full, the payments being made by the mortgagor on Brandt's certification. No architect had been retained to supervise the construction, but under the contract Brandt retained the right of rejection and could have withheld 15 per cent of the contract price before approving payment; by ordering final payments, in effect he accepted the work, and because of payment of these subcontractors in full, the court should not have charged plaintiff $360.00 for the expense of tearing out the floor of the garage so that the drain could be installed and the floor relaid.

The plastering work in the house was described as being wavy and having hair marks on certain walls and ceiling. Here, again, Brandt gave the order for payment, and the plastering contractor was paid in full, without the retention of any money for possible defective work. Brandt visited the building daily. He had an independent painting and decorating contractor do the interior of the premises and allowed him to paint the walls, including those which he said were defectively plastered. The counterclaim included damages for replastering and repainting the walls. Since he accepted the plastering, the court should not have charged Lundberg some $2000.00 for the alleged plastering defects.

Another item claimed as damages pertained to certain doors which were specified as of one and three-fourths inch thickness but were in fact only one and three-eighths inches thick. These were furnished by the Mill Company, installed and later painted. Being present when the doors were being installed, he could have rejected them, and doors of proper thickness could easily have been supplied. To make the substitution after the doors were accepted and painted would have required the purchase of new doors.

The court reduced plaintiff's claim by a rental deduction, as well as by the lump sum of approximately $3500.00; some of the items embracing this latter amount do not specifically appear in the record and therefore cannot be discussed in detail; nevertheless, what we have said applies to all the items of damage which defendants claimed. There appears to be no merit in the counterclaim, and, accordingly, we think plaintiff is entitled to the full amount of $5608.57, as claimed; therefore, the judgment of the Municipal Court is reversed and the cause remanded with directions to enter judgment for $5608.57. The cross-appeals are dismissed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS TO ENTER
JUDGMENT FOR $5608.57.
CROSS APPEALS DISMISSED.

NIEMEYER, J., and BURKE, J., Concur.

45851

O. W. LINDBERG, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
L. V. BRANDT, Appellee.	)	OF CHICAGO

ADDITIONAL OPINION

MR. JUSTICE FRIEND DELIVERED THE ADDITIONAL OPINION OF THE COURT.

On petition for rehearing defendant points out certain discrepancies in our opinion as to items included in the amount of the judgment entered here in favor of plaintiff. Upon re-examination of the record we find that defendant's contentions are well taken.

It is admitted that the contract price of the home is $32,875.00. Plaintiff's statement of claim alleges extras in the amount of $3015.09, although his bill of particulars sets forth a total of only $2348.18, and the amount proven is only $2026.57, making a total to which plaintiff would have been entitled in any event of $34,901.57.

Plaintiff in his statement of claim admits receiving from defendant the sum of $30,718.09 rather than $29,293; this would leave a balance of $4183.48.

Plaintiff's original complaint included the claim of Atomatic, Inc., which filed an intervening petition in the trial court for which judgment was entered and satisfied in the amount of $650.00, for which amount plaintiff

admits that defendant was entitled to credit. Deducting this amount from $4183.48 leaves a balance of $3533.48.

Plaintiff failed to furnish or install certain items in conformity with his contract aggregating $702.00, which amount should be credited to defendant, leaving a net balance of $2831.48.

Because of these credits, the opinion is modified to read: the judgment of the Municipal Court is reversed, and the cause remanded with directions to enter judgment for $2831.48. The petition for rehearing is otherwise denied.

OPINION MODIFIED TO READ: JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS. PETITION FOR REHEARING OTHERWISE DENIED.

NIEMEYER, P. J., and BURKE, J., Concur.

187 A

46019

350 I.A. 318

In the Matter of the Estate of LOTTIE CARTER, Deceased, CLARA EDNA WOOD NEWSOME, Intervening Petitioner, Appellant,	APPEAL FROM
v.	CIRCUIT COURT
VIRGINIA JOHNSTON, Executrix of the last will of Lottie Carter, Deceased, Appellee.	COOK COUNTY

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Lottie Carter died on September 19, 1943 in Chicago, Illinois, leaving a last will which was admitted to probate in Cook County on September 28, 1943. Her entire estate, valued at approximately $11,000.00, was devised and bequeathed to her sister Virginia Johnston. Eight years later, on July 24, 1951, Clara Edna Wood Newsome (hereinafter referred to as Mrs. Newsome) sought to file a petition in the Probate Court to set aside the order entered in 1943 admitting the last will of Lottie Carter to probate, alleging fraud and lack of notice. The Probate Court denied the motion, whereupon petitioner appealed to the Circuit Court of Cook County, where her motion to file the petition was again denied, and the order of the Probate Court sustained. Petitioner appeals.

Mrs. Newsome takes the position that, although she was the only child of a sister of Lottie Carter, deceased, she was not mentioned as an heir in the petition of Virginia Johnston for admission to probate of the will; that her name and identity as an heir were designedly

omitted from the petition; that she had no notice or knowledge of the probating of the will and did not discover the alleged fraud practiced upon her and upon the Probate Court until May 1, 1951; and that if she had been notified when and where the purported will was to be presented for probate, she would have interposed valid objection thereto. The record discloses that the petitioner, the testator and the executrix all lived at 4725 Vincennes avenue, Chicago, Illinois, in a building owned by the testator and passed to the executrix as sole legatee under the will; furthermore, petitioner was one of the three subscribing witnesses to the will, which was admitted to probate nine days after the testator's death. As such witness, she had stated that she witnessed the will at Lottie Carter's request, and that she then believed her to be of sound mind and memory. Under the circumstances it is difficult to give credence to the blithe recital in the petition that she had no notice or knowledge of the probating of the will until May 1951.

The Probate and Circuit Courts obviously rejected her contentions and exercised their judicial discretion by denying her motion to contest the order so many years after its entry; it has frequently been held that a court has discretionary power in ruling on the sufficiency of a petition to set aside a prior order (Village of LaGrange Park v. Hess, 332 Ill. 236; People ex rel. Elliott v. Benefiel, 405 Ill. 500); and this principle has been specifically invoked in cases involving the discretionary power of a pro-

bate court subsequently to allow or refuse to set aside the admission of a will to probate (In re Jadin's Estate, 196 Wis. 332, 219 N.W. 953; Old Colony Trust Co. v. Pepper, 268 Mass. 467, 167 N.E. 656).

It is especially significant that Mrs. Newsome's petition contains no facts or allegations which would afford a foundation for contesting the will and a reasonable probability of success in the event of contest. Since the testator had the right to dispose of her estate by will as she chose, assuming that she was of sound mind and memory, uninfluenced and uncoerced, and that the will complied with all statutory requirements, a will contest was the only means by which the disposition of her estate could be litigated; therefore, the allegation that petitioner had no notice would not justify the court, some eight years later, in setting aside the order admitting the will to probate, unless it clearly appeared from her petition that she had sufficient facts to afford a substantial basis for successfully contesting the will. In re Bray's Estate, 262 N.Y.S. 375. Accordingly, the order of the Circuit Court should be affirmed, and it is so ordered.

ORDER AFFIRMED.

NIEMEYER, J., and BURKE, J. Concur.

188 A

45549

350 I.A. 319

LELA J. RUSPANTINI, Executrix of the Estate of ITALO RUSPANTINI, Deceased, Appellant and Counterdefendant,	APPEAL FROM
v.	SUPERIOR COURT
SAMUEL STEFFEK, Appellee and Counterclaimant.	COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The Supreme court (414 Ill. 70) reversed our holding (346 Ill. App. 470) that defendant and counterclaimant, herein referred to as plaintiff, had failed to make a prima facie showing of due care for his own safety in the trial of his counterclaim for damages arising out of a collision of automobiles, and remanded the cause for our determination of other objections urged by the original plaintiff and counterdefendant, herein referred to as defendant. The detailed facts of the collision are stated in our former opinion and will not be repeated. Defendant's liability was a question of fact and the verdict of guilty cannot be disturbed. We are now concerned only with the extent of the injury suffered by plaintiff and the effect, if any, on the damages awarded of permitting plaintiff to demonstrate to the jury his inability to raise his arm above his shoulder.

The evidence as to plaintiff's injuries is meager and somewhat unsatisfactory. Plaintiff testified that three ribs were broken, that he had a hole in his left knee, a cut on his forehead and a fracture of his left foot; that he called a doctor, who gave him penicillin; that he was off

from work six weeks, losing wages of $88.50 a week; that he could not move his shoulder up or turn it around; that he took eight X-ray treatments, the last in December 1950, three years after the accident; that his shoulder hurts when he does any lifting or hard work.

Dr. Gaetano testified that he treated plaintiff the morning after the accident; that he had an abrasion on his forehead, a puncture of the left knee, contusion of the left thigh and of the anterior thorax; he appeared to be in pain and complained of pain in breathing; he was given sedatives and his chest bound and ordered to stay in bed; he had a fracture of the ribs; he, the doctor, saw plaintiff every day until he returned to work February 2, 1948; saw him next March 4th when plaintiff complained of pain in his right shoulder; an X-ray was ordered; diagnosed his condition as sub-deltoid bursitis; a week later novocain was injected to relieve the pain; saw him again two or three weeks later; X-ray treatments were given at the hospital once a week; he next saw the plaintiff April 22nd when the pain in his shoulder had subsided somewhat; there was some limitation of motion which is very common; he also complained of pain and swelling in the right upper abdomen, below the rib margin, which the doctor diagnosed as a fat tumor; this was removed July 3, 1948; plaintiff was off work about a week; the doctor did not treat him after July 24, 1948; the right shoulder was not completely healed and plaintiff has a limitation of motion in the shoulder on certain movements;

witness knows from his medical education that bursitis is a very common malady of the joints without any trauma or injury being involved, but in his experience he has not observed any cases of bursitis that did not result from trauma; there is a causal connection between the accident and the bursitis; he made no diagnosis as to the cause of the tumor.

There is no testimony as to the nature of the treatments, if any, given plaintiff after the doctor's first visit and up to the time plaintiff first complained of a sore shoulder on March 4th. There is no testimony that the bursitis and the consequent limitation of movement in the shoulder is permanent. Except for the eight X-ray treatments given plaintiff and the injection of novocain around March 11th, plaintiff received no treatment for his bursitis. In December 1950 the doctor rendered a bill for $275 covering "fracture of ribs, treatment of multiple contusions, Thrombophlebitis, Resection of Lipoma-Fat, necrosis-Troumatic." There is no breakdown of this bill, separating services rendered for injuries following the accident, and for removal of the tumor, which had no connection with the accident. The bill from the hospital includes an item of $7.50 for X-ray of the shoulder. Other items are connected with the tumor. Some of the X-ray treatments cost $3 and others $5.

The jury returned a verdict of $10,000, and judgment was entered thereon. Defendant complains that the damages awarded are grossly excessive. She also complains that the

court erred in permitting plaintiff to demonstrate before the jury his inability to lift his arm above his shoulder. Defendant objected to this demonstration. The court ignored the objection and directed the parties to proceed. The exhibition of an injured member to the jury is primarily in the discretion of the trial court. Wagner v. C. R. I. & P. Ry. Co., 277 Ill. 114; McKenna v. Chicago City Ry. Co., 296 Ill. 314; Wenger v. Strobel Steel Construction Co., 170 Ill. App. 383. It is a discretion, however, which should be exercised with great caution, particularly in cases where, as here, it is to the interest of the plaintiff to minimize the ability to move the injured member and the extent of the movement is wholly within the control of the plaintiff. In each of the cases cited by defendant the exhibition made by plaintiff was held to be harmless because the damages awarded were not excessive. In this case plaintiff's financial loss from loss of wages and expense of X-rays and X-ray treatments does not exceed $600. There is no competent evidence of the expense for services of the doctor connected with injuries or ailments attributable to the accident. Inasmuch as plaintiff had only eight X-ray treatments up to December 1950--three years after the accident, and only one injection of novocain, neither the pain nor the limitation of movement resulting from the bursitis has been severe. Any damages based upon future pain and suffering or limitation of movement would be based solely upon speculation. The damages of $10,000 are grossly excessive.

The judgment will be reversed and a new trial awarded unless the plaintiff files a remittitur herein of $5,000 within fifteen days.

AFFIRMED UPON FILING BY
PLAINTIFF (ORIGINAL DEFENDANT)
OF REMITTITUR OF $5,000;
OTHERWISE REVERSED AND REMANDED
FOR NEW TRIAL.

FRIEND, P. J., and BURKE, J., Concur.

45944

LEADING JEWELRY MANUFACTURING COMPANY, a Corporation, Appellant, v. YORKSHIRE WATCH COMPANY, a Corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered for defendant in plaintiff's action for the sales price of goods sold and delivered to defendant and rejected by it.

The original report of proceedings was stricken because of a defective certification by the trial judge. Thereafter plaintiff procured an amendment of the certification in the trial court and moved for leave to file herein a report of proceedings with certificate of the trial judge as amended. Defendant objected. A report of the proceedings in the trial court, on leave to amend, was filed herein. From this report of proceedings it appears that the trial court relied solely on its recollection in making the amendment. This was erroneous. Cerny v. Glos, 261 Ill. 331. Plaintiff's motion was denied.

As the record now stands there is no report of proceedings in the trial court before us. The errors relied upon for reversal relate solely to evidence and the error of the court in finding the issues against the plaintiff. We are therefore obliged to affirm the judgment.

AFFIRMED.

FRIEND, P. J., and BURKE, J., Concur.

190 A

350 I.A. 320

45988

ANDRE SKALSKI, Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
ENCYCLOPAEDIA BRITANNICA, INC., Appellant.	OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $70 entered in plaintiff's action for commissions and bonuses on sales of encyclopedias under a written contract of employment. The case was tried by the court without a jury.

Plaintiff's contract provided for the payment to him, on orders procured by him and accepted by defendant, in accordance with "the commission and bonus schedule now in force or which hereafter may be adopted." Paragraph 4 of the contract reads as follows:

> "PAYMENT OF BONUS: In addition to commissions, a Quality Bonus will be paid to Second Party quarterly in accordance with First Party's accounting practices. A'Quality Sale' is defined as an order which at the end of four (4) months after the close of the fiscal quarter (during which the order was accepted by First Party) is classified as paid or paying and on which not more than two (2) monthly payments are past due. The amounts specified in the Commission and Bonus Schedule will be credited to Second Party only on each such 'Quality Sale' and from such credits will be deducted amounts previously advanced as commissions on orders not classified as 'Quality Sales' for the same fiscal quarter. The net balance shall be payable to Second Party as a quarterly Quality Bonus. After the bonus has been paid on a 'Quality Sale' there will be no subsequent chargebacks of commissions or bonuses to Second Party on that sale, except

> in cases of irregularities where First Party refunds any part of the purchase price or makes an adjustment with the customer. It is mutually agreed that such Quality Bonuses shall not be due and payable to Second Party until Second Party has procured a minimum of $2,500 in orders acceptable to First Party."

Plaintiff's claim, so far as the same is material on this appeal, is for balance due on orders referred to herein as the Goodspeed and Rhodes accounts procured respectively on February 8, 1951 and April 11, 1951. On each of these sales plaintiff claimed a commission of $84, and a quality bonus of $22. He credited defendant with $67.26, leaving a balance claimed of $144.74. There is no basis for allowing plaintiff $70. He is entitled to the full amount of his claim or nothing.

The evidence shows that on August 1, 1951 the Goodspeed account was delinquent more than two monthly payments; that the Rhodes account on November 1, 1951 was likewise delinquent more than two months. Neither of the accounts were quality sales as defined in the contract of employment. By that contract the character of the sale was to be determined at the end of four months after the quarter of the year in which the sale was procured by the salesman. The contract, as hereinabove quoted, specifically provided that plaintiff should be credited with commissions and bonuses "only on each such Quality Sale," and that "After the bonus has been paid on a Quality Sale there will be no subsequent chargebacks of commissions or bonuses," except in cases of certain irregularities, none of which is shown in the evidence before us. Defendant contends that under this

agreement plaintiff's rights to commissions and bonuses are determined by the status of the order or account at the end of four months following the quarter of the year in which the sale was made; that if the sale is a quality sale at that time, plaintiff would be entitled to the full commission, plus the quality bonus, even though no further payments were made on the contract, and, that in determining the rights of the parties, subsequent payments, if any, made by the purchaser, are immaterial. With this contention we must agree. No fraud or overreaching by defendant in procuring the contract with plaintiff is charged or shown by the evidence. Both parties were competent to contract and are therefore bound by their agreement. Under the agreement plaintiff is entitled to full commission, plus a quality bonus on quality sales, even though no further payments are received by defendant after classification of the order as a quality sale. He is not entitled to a commission or bonus on sales that are not quality sales as defined in the contract. Over a period of time it is not improbable that nonquality sales on which payments are made after the date for determination of the quality of the sale, and quality sales on which no further payments are received after such date, will balance each other.

The judgment is reversed.

REVERSED.

FRIEND, P. J., and BURKE, J., Concur.

191 A

350 I.A. 320

46021

FRED A. GARIEPY, Appellant,	APPEAL FROM
v.	COUNTY COURT
CHICAGO SERVICE PARKING CO., a corporation, Appellee.	COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant entered after trial by the court without a jury on his claim for $350, the value of wearing apparel and a suitcase alleged to have been lost or taken while plaintiff's automobile was parked in defendant's open parking lot.

Plaintiff testified that he drove his automobile into defendant's parking lot at 8:30 a. m. on June 20, 1951; that he told the attendant, identified on the trial as the witness Jackson, that he wished to have the automobile locked and the key given to him as he had valuable golf clubs, bag and equipment in the rear of the car, and that the car should be parked near the office where it could be watched; that the attendant said he could not give plaintiff the key but that the car would be locked; that plaintiff returned around noon, found that the car had been parked at the far end of the lot and that all of his personal property except the golf clubs, was missing. At the close of plaintiff's evidence defendant moved for a finding for defendant. This motion was denied. Defendant then offered the testimony of Jackson and another attendant at the parking lot at the hour when plain-

tiff left his automobile. These witnesses directly contradict plaintiff's testimony that he called attention to the property in the automobile, asked that the car be locked and he be permitted to take the key. Jackson further testified that he did not recall seeing any golf equipment, clothes or shoes in the back seat of a car. The employee of defendant in charge of the parking lot and an officer of defendant both contradict the testimony of plaintiff as to his dealings with defendant after discovery of the loss of his property. Plaintiff testified in rebuttal. At the close of all the testimony defendant moved that "an objection (judgment) be entered herein and a finding for the defendant on the basis" that the company was never put on notice as to the contents in the car at the time plaintiff claimed he parked the car. After hearing the closing arguments of counsel on both sides, the court stated: "There was a motion made for a judgment in favor of the defendant at the end of all the evidence. The question in this case is whether there is a bailment involved, with presumptive authority in the attendant is sufficient enough to find the parking lot responsible for the loss of goods that has happened under the facts in this particular case, and, that the court does not think there is, and is going to allow the motion. Judgment will be for the defendant." On the same day, July 8, 1952, an order was entered reciting: "After hearing all the evidence adduced and the arguments of counsel, the court finds the

issues for the defendant and against the plaintiff. Therefore, it is hereby ordered and adjudged that said defendant do have and recover of and from the said plaintiff, its costs and charges in this behalf expended and have execution therefor."

October 2, 1952, on plaintiff's motion, an order was entered nunc pro tunc as of July 8, 1952 reciting:

> "On motion of defendant for directed finding in its favor, at the close of all the evidence, and the court being fully advised in the premises,
> It is ordered that said motion be and the same is allowed and judgment is entered for defendant and against plaintiff herein, and judgment is hereby entered on said directed finding."

The next day plaintiff filed a notice of appeal from the orders of July 8th and October 2nd. We will first dispose of the appeal from the latter order. This order was procured by plaintiff for the purpose, as stated in his reply brief, "of clarification and to eliminate any possibility of misunderstanding." Plaintiff claims that the order shows the trial court, at the close of all the evidence, acted on a motion of defendant similar to a motion for directed verdict in a trial by jury, and in so doing did not determine any issues of fact but based his decision solely on a question of law---whether plaintiff's evidence, standing alone, established a prima facie case. There is no basis in the record, including the report of proceedings subsequently filed, for the use of the term "directed finding" in the order. The term is an anomaly in a trial before the court, in which all findings of law and fact are

made by the court and there is no one whom the court could direct. The record must be read as a whole. The basis of defendant's motion, as stated by counsel, was that defendant was never put on notice as to the golf clothing, shoes, etc., at the time the car was parked. This motion necessarily required determination of the issue of fact raised by the contradiction between the testimony of plaintiff and the employees of defendant. Furthermore, the statement of the court hereinbefore quoted shows that the trial court was entering judgment after weighing the evidence before him.

Moreover, the order of October 2nd is a nullity because entered by the trial court without jurisdiction. The order of July 8th was a final order. The motion for the order entered October 2nd was first made September 8, 1952, more than 30 days after the entry of the order of July 8th. The court therefore was without jurisdiction to amend, clarify or in any other manner alter the order except as to matters of form, and such amendment or alteration could only be made from some note, memorandum or memorial paper remaining in the files or in the records of the court. It cannot rest in the recollection either of the judge or of other persons; nor can it be based on ex parte affidavits or testimony. Peo. ex rel. Sweitzer v. City of Chicago, 363 Ill. 409, 413. The case of People ex rel. Carr v. Psi Upsilon Fraternity, 320 Ill. 326, an application for judgment for delinquent taxes, is similar to the case at bar. At the July 1925 term of court judgment was entered

sustaining defendant's objections to the taxes, and judgment for plaintiff was refused. At the succeeding term of court an order was entered overruling defendant's objections and entering judgment against its lands nunc pro tunc as of August 7, 1925. No bill of exceptions was filed. Plaintiff contended that defendant's objection to the latter judgment could not be urged upon a common law record and that the objection was waived because it was not urged in the trial court. The Supreme court said:

> "The rule is, that in cases where, as here, the error complained of appears on the face of the record there is no necessity to except to the ruling, and it is not necessary, therefore, that there be a bill of exceptions filed in this court. (citations.)
>
> Nor is there any merit in the contention of appellee that appellant is estopped from urging its objection here. The objection goes to the court's jurisdiction of the subject matter. Such an objection, it is well settled, can be raised at any time."

It may be added that there is nothing in the record to warrant the entry of the order of October 2nd nunc pro tunc as of July 8th. A nunc pro tunc order is proper only when an order had in fact been entered by the court but through error or omission it does not appear of record. In re Estate of Young, 346 Ill. App. 257. Moreover, where want of jurisdiction appears upon the face of the record, it is the duty of the reviewing court on its own motion to recognize the want of jurisdiction and refuse to give effect to a void judgment or order. Johnson v. Nelson, 341 Ill. 119. Plaintiff's rights, if any, on appeal must be based on

errors in the original judgment entered July 8th.

Plaintiff's right of action, as alleged in his statement of claim and supported by his testimony, is based on notice to defendant that the lost articles for which suit is brought were in the rear of plaintiff's automobile when it was turned over to the attendant at the parking lot. As stated by this court in Ohge v. LaSalle-Randolph Garage Corp., 328 Ill. App. 665, and Corpus Juris Secundum, Vol. 61, sec. 726 at page 871, defendant is not liable for the loss of plaintiff's property unless it had notice at the time the automobile was parked that such property was in the car. As to the question of notice, there is a direct conflict in the testimony of plaintiff and that of Jackson, the parking lot attendant. The determination of the credibility of the witnesses and of the weight to be accorded their testimony is committed to the court in a trial without a jury, and where as here the evidence is merely conflicting, the reviewing court will not substitute its judgment for that of the trial court. People v. City of Chicago, 363 Ill. 409. Or as stated in Calvert v. Carpenter, 96 Ill. 63, and Crook v. Crook, 329 Ill. App. 588, a court of review will not reverse the judgment of the trial court where there is an irreconcilable conflict in the testimony and the evidence of the successful party when considered by itself is clearly sufficient to sustain the verdict. There being no special findings of fact it must be presumed that the trial court determined in favor of

defendant all issues of fact necessary to support the judgment for defendant.

The judgment appealed from is affirmed.

AFFIRMED.

FRIEND, P. J., and BURKE, J., Concur.

192 A

46041

UNITED MANUFACTURING COMPANY, an Illinois corporation, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MITCHELL NOVELTY COMPANY, a Wisconsin corporation, Appellant.	)	OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $28,395.73 entered on the verdict of a jury in plaintiff's action for the balance due on four conditional sales agreements, with interest and attorney's fees.

Plaintiff instituted its action February 10, 1950 by procuring a judgment by confession against defendant for $22,017.28. Defendant filed a petition to vacate the judgment, alleging that the judgment by confession was based upon four conditional sales agreements bearing dates between September 21, 1949 and October 20, 1949 for the purchase by defendant from plaintiff of a number of coin operated amusement devices called "Shuffle Alley"; that defendant through its officers and engineers, having previously conceived the idea for the development of the amusement game Shuffle Alley, agreed orally with plaintiff in the latter part of July 1949 to allow plaintiff to manufacture and market the game in consideration of the payment to defendant of a reasonable royalty based upon a percentage of the manufacturer's selling price of Shuffle Alley; that defendant would place working models of the game

built by plaintiff in certain locations in order to determine the public's acceptance of the game before proceeding with the manufacture of the devices; that such tests were successful and plaintiff commenced the manufacture and marketing of the amusement devices; that defendant had been engaged in the distribution and operation of coin-operated amusement devices of all kinds and purchased from plaintiff a large number of Shuffle Alley devices, paying one half of the purchase price in cash and the balance being evidenced by the conditional sales agreements upon which judgment by confession had been entered; that plaintiff, although urgently requested by defendant, deferred from time to time discussions as to the amount of the royalty to be paid defendant and on or about January 12, 1950 agreed that as partial payment on account of royalties due to defendant the balance due on the conditional sales contracts would be considered paid, that the books of plaintiff would show such fact, and plaintiff would return to defendant the conditional sales contracts marked paid; that a royalty of 5 per cent of the manufacturer's selling price is the usual, customary and reasonable royalty prevailing in the coin-machine industry for the type of disclosure made by defendant to plaintiff of its idea for the game Shuffle Alley; that plaintiff has manufactured and marketed in excess of 24,000 Shuffle Alley games at a manufacturer's selling price of $225 each; that contrary to its agreement to apply the balance due on the conditional sales agreements

as part payment of the royalties due to defendant, plaintiff caused judgment by confession to be entered thereon; that defendant has filed a suit in chancery against plaintiff in the Federal court in Chicago for an accounting with respect to the number of Shuffle Alley games manufactured and sold for a determination of the royalties to which defendant is entitled, and for other relief.

Defendant's motion to vacate the judgment was denied. On appeal this court (342 Ill. App. 201) reversed the order of the trial court and remanded the cause so that the judgment might be opened up and defendant be allowed to plead and defend. On remandment an order was entered directing that the judgment be opened up, that same stand as security, that the petition of defendant stand as an affidavit of merits and defendant be given leave to file a jury demand upon payment of costs. Plaintiff replied to defendant's affidavit of merits, denying each of the material allegations therein. More than a year later, on February 13, 1952, plaintiff moved for a summary judgment and in support of its motion filed an affidavit of an officer and agent setting up that on January 29, 1952 final judgment was entered in defendant's action in the Federal court, dismissing with prejudice its claim against plaintiff for royalties or compensation for the manufacture and sale by plaintiff of the Shuffle Alley amusement devices. Attached to the affidavit were copies of the conclusions of fact and law of the trial judge, and the

judgment entered. In opposition to the motion for summary judgment defendant alleged its intention to appeal from the judgment of the Federal court. Plaintiff's motion for summary judgment was denied. Defendant then amended its affidavit of merits by alleging that the Shuffle Alley games, the subject matter of the conditional sales agreements, are "illegal gambling devices under the ordinance of the City of Chicago and the State of Illinois and that they cannot as a matter of law be good consideration and any agreement based upon such a consideration is invalid and unenforceable." On defendant's appeal from the judgment in the Federal court, the judgment was affirmed. (Mitchell Novelty Co. v. United Mfg. Co., 199 F.2d 462.) Within a few days a trial resulting in the judgment appealed from was commenced. In the course of this trial plaintiff amended its statement of claim, . . increasing the interest and the attorneys' fees which it sought to recover. The verdict and judgment are for the full amount claimed by plaintiff.

The principal question to be determined on this appeal is whether or not the judgment in the Federal court is a bar to defendant's claim for royalties or commissions on the Shuffle Alley games manufactured by plaintiff. The allegations of defendant in the complaint filed by it as plaintiff in the Federal court are substantially identical with the petition to vacate the judgment by confession filed herein, and need not be repeated. The prayer of the complaint is for an accounting, for an injunction restraining

plaintiff herein from pursuing or prosecuting any further action in connection with the judgment by confession in this cause until the further order of court, enjoining and restraining it from further manufacturing or selling the Shuffle Alley game until the further order of court, and onjoining and restraining it from taking possession of or instituting any action for recovery of the games described in the conditional sales agreements involved herein. Plaintiff's answer in the suit in the Federal court is a direct denial of all the material allegations of the complaint and substantially identical with its reply to the affidavit of merits herein. Trial was had by the court, who found, as stated in the conclusions of fact, that plaintiff did not at any time promise or agree to pay to defendant any compensation for or by reason of any disclosure or suggestion by defendant to plaintiff in connection with the Shuffle Alley game or any part or feature thereof; that the disclosures claimed by defendant to have been made to plaintiff in connection with the Shuffle Alley game were "merely vague or general suggestions or hints, such as are usually made by operators as a result of their observation of commercial amusement devices or of testing games on location, and were of no novelty or specific application," and concluded as a matter of law that "No agreement, as alleged by the plaintiff (defendant herein) in its complaint, for the payment to the plaintiff of compensation or royalties by the defendant (plaintiff herein) was proved, nor may any such agreement be implied from the evidence presented by the plaintiff."

Judgment was entered dismissing the complaint, with prejudice.

In the Federal court and in the proceeding before us defendant's right to a royalty or a commission on Shuffle Alley games manufactured by plaintiff was directly in issue. It was determined in the Federal court upon testimony introduced by defendant herein, adversely to defendant. That finding is an estoppel by verdict (Hanna v. Read, 102 Ill. 596) and is conclusive against defendant. There being no royalties or commissions payable to defendant, there was nothing due defendant to be credited on the unpaid balances of the conditional sales agreements.

Defendant insists that under the holding in Coven Distributing Co., Inc. v. City of Chicago, 346 Ill. App. 448, the Shuffle Alley game is a gambling device the possession or use of which in any place of public resort within the City of Chicago is illegal and prohibited by ordinance. In the case cited there was testimony that the bowler game involved in that suit was "similar to a game known as Shuffle Alley where a disc propelled by hand is used." In the present case the only evidence relating to the character of the game, its operation and use, is the testimony of the president of defendant. He testified that at the time he purchased the games there was an injunction in effect, issued by the Circuit Court of Cook County, restraining the officials of the City of Chicago from interfering with the game; that defendant had no knowledge what the games

were used for--it only places them on location and did not know what happened after they were placed; they were not supposed to be used for gambling; that on all machines sold to defendant plaintiff had placed stickers: "No prizes or awards of any kind permitted"; that there is nothing on the game where if you put a coin in it you get money back; even if you get a score of 300, like in bowling, you didn't get a right to play another game; there is no so-called free play on the game unless the location owner puts it out; the game sold by plaintiff had no free-play devices, it is just an amusement game; that defendant began removing from the locations the games purchased from plaintiff about February 1950, not because the game was illegal--at that time I considered the game legal; the manufacturers were coming out with new models and we had to replace them; we removed the last Shuffle Alley games in Chicago about January or February 1952; we were advised that unless we removed them they would be confiscated. It is apparent from this testimony, as well as from an examination of one of the games before us as an exhibit, that it is not inherently a gambling device. The testimony on behalf of defendant negatives any idea that the games were sold by plaintiff to be used for gambling purposes. The conditional sales agreements were, therefore, valid. Question Game Co., Inc. v. Ploner, 273 Ill. App. 187.

The judgment is affirmed.

AFFIRMED.

FRIEND, P. J., and BURKE, J., Concur.

3553 A

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1953

Term No. 53 F 2 Agenda No. 4

350 I.A. 322

VINCENT WOLTERS and THOMAS F. BRAND, a Minor, who sues by Francis Brand, His Father and Next Friend,	
Plaintiffs-Appellees,	Appeal from the Circuit Court of St. Clair County.
vs.	
FRANK VENHAUS and ANNIE VENHAUS, Administrators of the Estate of Raymond Venhaus, deceased,	
Defendants-Appellants.	

CULBERTSON, J.

This is an appeal from a judgment of the Circuit Court of St. Clair County in favor of plaintiffs, VINCENT WOLTERS and THOMAS F. BRAND, a minor, who sues by Francis Brand, His Father and Next Friend, in the respective sums of $3,000.00 and $500.00, as against defendants, FRANK VENHAUS and ANNIE VENHAUS, Administrators of the Estate of Raymond Venhaus.

The complaint is based upon personal injuries received while the plaintiffs were riding in an automobile operated by defendants' intestate

on April 28, 1951 on a highway near Lebanon, in St. Clair County. The complaint necessarily charged wilful and wanton misconduct as a basis for recovery. The evidence showed that about midnight on April 27, 1951 the plaintiffs were guest passengers riding in the rear seat of an automobile driven by Raymond Venhaus, deceased. Another passenger, Theresa Kues, who was the fiancee of Venhaus, was riding in the front seat, next to the driver. The automobile was traveling in a westerly direction as the hard road approached a railroad overpass. The road made a slight curve just before it reached the overpass. The weather was clear and dry. The automobile was being driven 55 to 60 miles per hour.

The evidence showed that the driver of another automobile, coming in the opposite direction, was descending the east approach of the overpass when he saw the west-bound Venhaus car. The west-bound Venhaus automobile was swerving and weaving over the center line of the roadway into the south side and then into the north side, and it performed such weaving operations two or three times before a collision occurred. The driver of the other car turned his automobile to the south side of the pavement as much as possible in an attempt to avoid a

collision but was unable to do so, when the Venhaus car swung across the center line into the wrong side of the road without decreasing speed and ran headon into the other automobile. The collision was so violent that Venhaus was killed and the plaintiffs and the driver of the other automobile were severely injured.

After the accident a State Highway Officer noticed tire skid marks on the pavement made by the east-bound automobile which were entirely on the proper side of the road, but there were no tire skid marks of any kind made by the Venhaus automobile which showed any effort to apply the brakes before the collision. No direct testimony of the occurrence by the plaintiffs was permitted after objection thereto by counsel for defendants under the Evidence Act, although the plaintiffs were permitted to testify as to the injuries and damages under Section Two of the Evidence Act.

It is contended on appeal in this Court that the Trial Court erred in failing to grant the defendants' motion for a directed verdict at the close of plaintiff's case and at the close of all the evidence, and likewise erred in failing to enter judgment notwithstanding the verdicts.

The contention made by the defendants is based on the contention that there was no evidence that defendants' intestate was guilty of wilful and wanton misconduct. This contention is centered chiefly on the argument that the testimony showed inconsistencies and was incredible, particularly that of the driver of the automobile with which the Venhaus automobile collided.

A motion for directed verdict or for judgment notwithstanding the verdict raises the fundamental question as to whether there is in the record any evidence which standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case. The Court does not weigh the evidence and contradictory evidence and explanatory circumstances are disregarded (LINDROTH vs. WALGREEN CO., 407 Ill. 121, 130). A verdict of the jury is not set aside merely because contrary inferences could be drawn from the evidence, or because the Court might feel that other conclusions than those drawn by the jury would be more reasonable. The credibility of witnesses is a question for the jury (FLANAGAN vs. CHICAGO RY. CO., 243 Ill. 456). If, however, there is a complete absence of probative facts to support the conclusion reached by the jury, the Court would be

justified in reversing on appeal (LAVENDER vs. KURN, 327 U. S. 645).

The question for consideration in the present case is whether there is any evidence from which a jury could reasonably conclude that Venhaus, the deceased driver, operated his automobile in a wilful and wanton manner. An intentional disregard of a known duty necessary to the safety of the person of another such as exhibits a conscious indifference to consequences makes a case of constructive wilfullness. An act may be wanton when the party doing or failing to act is conscious of his conduct and though having no intention to injure is nevertheless aware from his knowledge of surrounding circumstances and conditions that his conduct, if pursued, will naturally and probably result in injury (LEVANTI vs. DORRIS, 343 Ill. App. 355, 360; STREETER vs. HUMRICHOUSE, 357 Ill. 234, 238).

In the case before us Venhaus was driving an automobile in the night at a speed of 55 to 60 miles an hour, approaching a railroad overpass where the road curved. The evidence showed that he drove at that speed on the wrong side of the highway two or three times before the collision. A car coming in the opposite direction was displaying proper headlights and traveling in its

proper traffic lane at all times. Under the circumstances there was ample evidence from which a jury could conclude that the conduct on part of Venhaus demonstrated an intentional disregard of his duty to drive in the proper traffic lane. Under the circumstances the swiftness of the events would also support the jury's conclusion that objection or warning on part of plaintiffs would not have been reasonably expected of a guest under the circumstances, and that plaintiffs who were rear seat passengers having no control of the automobile were not guilty of wilful and wanton contributory misconduct.

Since there was sufficient evidence to support the charge of wilful and wanton misconduct, and the question of whether the injuries had been inflicted by such wilful and wanton misconduct having been submitted for determination as a question of fact by the jury, this Court on appeal will not reverse such determination. The judgments of the Circuit Court of St. Clair County will, therefore, be affirmed.

Judgments affirmed.

Bardens, P. J.; and Scheineman, J., concur.

(Publish Abstract only)

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1953

Term No. 53 F 10 Agenda No. 8

FRANK SERRANO,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court
vs.	)	of Madison
	)	County,
OMAR MIDYETT, d/b/a MIDWEST	)	Illinois.
FLYERS SCHOOL OF AVIATION,	)	
	)	
Defendant-Appellee.	)	

CULBERTSON, J.

This is an appeal from a judgment for the defendant-appellee, OMAR MIDYETT, d/b/a MIDWEST FLYERS SCHOOL OF AVIATION (hereinafter called the defendant), and against the plaintiff-appellant (hereinafter called the plaintiff), entered by the Circuit Court of Madison County.

The action was filed by plaintiff as a result of injuries sustained in the fall of an airplane plaintiff contends was defective, Plaintiff contended that the airplane was furnished by defendant for flight training under the Veterans'

Administration program for service veterans. Plaintiff was seriously injured as a result of the plane crash. A verdict had been returned by the jury in the sum of $12,000.00 in favor of plaintiff. On motion for judgment notwithstanding the verdict and for a new trial the Circuit Court allowed both motions and entered judgment for the defendant and against plaintiff for costs, but made the new trial conditional upon a reversal by this Court on the judgment notwithstanding the verdict.

Plaintiff contended in the Court below and contends on appeal that, the relationship between plaintiff and defendant was that of bailor and bailee. The plaintiff had contended that he was a student taking flight training from the defendant under the Veterans' Administration program, and that defendant furnished him with a defective airplane. The evidence showed that the airplane which plaintiff was piloting at the time of the crash had been sold by defendant to plaintiff under a conditional sales contract for $271.00, and that plaintiff had paid defendant $100.00 under such agreement, but contended that there had been an oral termination by him, acquiesced in by the defendant. Plaintiff bought the gasoline for the plane and flew it a number of days without getting permission from the flight

office to do so. Plaintiff had taken many people up for rides, and apparently used and exercised control of ownership over the airplane. There was apparently no evidence of a record of flights "logged" by the plaintiff under the Veterans' Administration program, identifying the number of the particular plane in which the injuries were sustained, although there was a record of such flights on other airplanes not covered by a contract of purchase between the parties.

It was the contention of plaintiff that he had flown the plane in question on April 16, 1950 and had noticed something wrong with the fuel pressure gauge and decided it was the fuel pump. Plaintiff testified that he told defendant that he had better have someone look at the fuel pump; that it was not working properly. Defendant's testimony was that he did not recall any such statement being made and denied that the statement was made to him by plaintiff. On the morning of April 22, 1950 plaintiff, without asking defendant about having made any corrections or repairs on the fuel pump, and apparently without asking permission of anyone to use the plane, took the plane and flew it for his own personal purposes.

The crash which is the basis of the action occurred on the second flight of the plane

on the morning of April 22. Plaintiff had first flown the plane at about 9:30 a.m. with a passenger, Father Henry J. Mack, a priest, in the rear cockpit. This flight lasted about an hour. At about 10:30 the plaintiff, with the Priest as a passenger, again took off in the plane. It was shown that plaintiff had a private pilot's license and had flown approximately 200 hours, and was then working on a commercial license. Plaintiff said he checked the instruments in the cockpit, including the fuel pump gauge, and that the fuel pressure gauge seemed to hesitate at that time. He went ahead, however, and while flying in the pattern, after the takeoff, in flying to gain altitude, the plane stalled and went into a spin and crashed. The Trial Court reserved ruling on defendant's motion for directed verdict at the close of the evidence, but allowed the motion for judgment notwithstanding the verdict after the jury returned a verdict for plaintiff, and assessed plaintiff's damages at $12,000.00.

In determining whether a motion for judgment notwithstanding the verdict should be granted a question of law is raised as to whether, when all the evidence is considered together with all reasonable inferences from the evidence, in its aspect most favorable to the plaintiff, there is

a total failure to prove any necessary element of the plaintiff's case (MAY vs. ILLINOIS POWER CO., 342 Ill. App. 370, 374).

To make out a case as against defendant under plaintiff's theory, he must establish due care and caution for his own safety; that the defendant was guilty of negligence as set forth in the complaint; and that the negligence proximately caused plaintiff's injuries (MAY vs. ILLINOIS POWER CO., supra). So far as the record shows the plane was completely under the control of the plaintiff, and at the time of the accident under the record, plaintiff apparently was not flying as a student of defendant.

Viewing all the evidence in the case, and notably the undisputed evidence as presented to the Court, there seems to be no basis for sustaining the contention of the plaintiff that the relationship of bailor and bailee existed. The case was not based, so far as the record shows, on an intrinsic failure to furnish a plane as vendor which was suitable for the purpose sold, but was based upon a contention that there was a duty to keep in repair and to inspect the plane to keep it free from any defects. There seems to have been no evidence which as a matter of law could support the verdict of the jury (KROTZER

vs. DRINKA, 344 Ill. App. 256). The evidence in the record, with all its reasonable inferences would not be sufficient to support plaintiff's cause of action. The Rule sometimes referred to as the "scintilla of evidence rule" does not apply in Illinois, and while the Court does not weigh the evidence nor consider the preponderance of the evidence on a motion for judgment notwithstanding the verdict, the Court should consider whether there is any evidence which fairly tends to prove the cause of action (KNUDSON vs. KNUDSON, 382 Ill. 492, 494).

Since the right of possession under a conditional sales contract was in the plaintiff, the relationship of bailor and bailee could hardly have existed (PEOPLE vs. MOSES, 375 Ill. 336, 339). In absence of such showing and under the record before us, which fails to establish any other basis for recovery, since there was no showing of negligence or breach of duty on part of defendant, the action of the Trial Court in allowing the motion notwithstanding the verdict was proper.

In view of the apparently uncontradicted evidence, and the failure of any evidence to establish the bailor-bailee relationship, we cannot say that there was any evidence in the Trial Court which would justify the submission of the relationship of plaintiff and defendant to the jury, as a

question of fact. We must, therefore, conclude that the Trial Court properly allowed the motion for judgment notwithstanding the verdict. The judgment of the Circuit Court of Madison County will, therefore, be affirmed.

Judgment affirmed.

Bardens, P. J.; and Scheineman, J., concur.

(Publish Abstract)

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D. 1953

General No. 9873 Agenda No. 9

Frank B. Schmedeke, Plaintiff-Appellee, vs. Wabash Railroad Company, Defendant-Appellant.	Appeal from the Circuit Court of Christian County

Wheat, P. J.

Plaintiff-appellee Frank B. Schmedeke, upon jury verdict, obtained judgment in the sum of $1,026.50 and costs against defendant-appellant Wabash Railroad Company by reason of damages to his automobile when struck by a train on a public crossing.

The collision occurred on February 16, 1951, at about 11:45 P.M. at the Perrine Street crossing at Morrisonville, Illinois. The car was driven by plaintiff's brother, the sole occupant. The sole charge of negligence in the complaint as it went to the jury was that the defendant maintained the crossing in such a manner that it became rutted and chuck holes sufficiently large to stop an automobile were allowed to form in the crossing, thereby making it unsafe as to persons and property, contrary to Chapter 114, Section 62, Illinois Revised Statutes 1949.

Plaintiff has agreed that such statute has been interpreted by the courts to mean that a railroad must maintain its crossings so that they are reasonably safe. Defendant

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1953

General No. 9873 Agenda No. 1, Ill. Rev. Stat.

Frank B. Schmedeke, Plaintiff-appellee, vs. Wabash Railroad Company, Defendant-appellant.	Appeal from the Circuit Court of Christian County

Wheat, P. J.

Plaintiff-appellee Frank B. Schmedeke, upon jury verdict, obtained judgment in the sum of $1020.50 and costs against defendant-appellant Wabash Railroad Company by reason of damages to his automobile when struck by a train on a public crossing.

The collision occurred on February 10, 1951, at about 11:45 P.M. at the Peoria Street crossing at Morrisonville, Illinois. The car was driven by plaintiff's brother, the sole occupant. The sole charge of negligence in the complaint as it went to the jury was that the defendant maintained the crossing in such a manner that it became rutted and such holes sufficiently large to stop an automobile were allowed to form in the crossing, thereby making it unsafe as to persons and property, contrary to Chapter 114, Section 64, Illinois Revised Statutes 1949.

Plaintiff has agreed that such statute has been interpreted by the courts to mean that a railroad must maintain its crossings so that they are reasonably safe. Defendant

stipulated as to the amount of damages and makes no objection as to the giving or refusing of instructions, rulings or evidence, but limits its argument to two contentions, the first being that the evidence was insufficient to prove that the railroad was negligent in maintaining such crossing, and the second being that even if such negligence were proved, such was not the proximate cause of the collision by reason of snow and ice.

The assignments of error may be divided into two classifications, the first being that the Court erred in denying the motion of defendant for a directed verdict at the close of plaintiff's evidence, in denying a similar motion at the close of all the evidence and in denying a motion for judgment notwithstanding the verdict; the second being that the Court erred in denying a motion for a new trial.

An analysis of the evidence indicates that Perrine Street extends northerly and southerly and crosses defendant's tracks which extend northeasterly and southwesterly. At this crossing there are three tracks, the one with which this case is concerned being the northerly track on which trains operate going in a southwesterly direction. The brother of plaintiff was driving the automobile and turned on to this crossing from the north. The travel portion of the crossing was about twenty feet wide made of oiled dirt with some asphalt and rock between the rails and tracks. There is an elevation of about twenty-two inches at the crossing from the road on which the driver of the automobile had been proceeding before he turned south on to the crossing, a distance of about sixty-five feet. The driver, Claude Schmedeke, testified that it was sleeting slightly at

stipulated as to the amount of damages and makes no objection as to the giving or refusing of instructions, rulings, or evidence, but limits its argument to two contentions, the first being that the evidence was insufficient to prove that the railroad was negligent in maintaining such crossing, and the second being that even if such negligence were proved, such was not the proximate cause of the collision by reason of snow and ice.

The assignments of error may be divided into two classifications, the first being that the court erred in denying the motion of defendant for a directed verdict at the close of plaintiff's evidence, in denying a similar motion at the close of all the evidence and in denying a motion for judgment notwithstanding the verdict; the second being that the court erred in denying a motion for a new trial.

An analysis of the evidence indicates that parties concerned extends northerly and southerly and crosses defendant's tracks which extend northeasterly and southwesterly. At this crossing there are three tracks, the one with which this case is concerned being the northerly track on which trains operate going in a southwesterly direction. The brother of plaintiff was driving the automobile and turned on to this crossing from the north. The travel portion of the crossing was about twenty feet wide made of oiled dirt with some asphalt and rock between the rails and tracks. There is an elevation of about twenty-two inches at the crossing from the road on which the driver of the automobile had been proceeding before he turned south on to the crossing, a distance of about sixty-five feet. The driver, Claude Lopendahn, testified that it was sleeting slightly at

about 9 o'clock and began to snow at 9:30 and snowed continuously thereafter; that at about 11:45 as he turned south from the main road on to the road crossing the tracks, he shifted into second gear; that the approaching train was readily visible about a quarter of a mile away and that he had ample time to cross the tracks; that as his front wheels crossed the most northerly rail his right front wheel fell into a hole on the south side of such rail; that such hole was about a foot wide, about three feet long and six to eight inches deep and parallel with such rail; that he had no chains upon his car; that he was thoroughly familiar with the crossing; that when his right front wheel fell into such hole the wheels of the car began to spin and his motor was stalled; that he restarted the motor and tried to go both forward and backward after which the motor again stalled; that observing the oncoming train he got out of the automobile which was then struck by the locomotive. Another brother of plaintiff and the driver, Dale Schmedeke, testified that at about 8:30 the next morning he went to the scene of the collision and saw the tracks from where the automobile was hit to where it finally landed; that there was a hole on the south side of the first rail about three feet long, about one foot wide and six to eight inches deep, and that such hole was not then full of snow. One Grothe, the fireman on the locomotive, testified that it had been snowing and that there was snow on the ground. The witness Gandy, a brakeman on the train, believed that it had snowed but did not remember whether it was snowing at the time or not. The engineer Shine testified that he observed the automobile come up with the front end on the track, after which it stopped; that the locomotive struck the automobile at about the position of the front wheels; that

about 9 o'clock and began to snow at 9:30 and snowed continuously thereafter; that at about 11:45 as he turned south from the main road on to the road crossing the tracks, he shifted into second gear; that the approaching train was readily visible about a quarter of a mile away and that he had ample time to cross the tracks; that as his front wheels crossed the most northerly rail his right front wheel fell into a hole on the south side of each rail; that each hole was about a foot wide, about three feet long and six to eight inches deep and parallel with each rail; that he had to change from his car; that he was thoroughly familiar with the crossing; that when his right front wheel fell into each hole the wheels of the car began to spin and his motor was stalled; that he restarted the motor and tried to go both forward and backward after which the motor again stalled; that observing the oncoming train he got out of the automobile which was then struck by the locomotive. Another brother of plaintiff and the driver, Dale Commadore, testified that at about 7:30 the next morning he went to the scene of the collision and saw the tracks from where the automobile was hit to where it finally landed; that there was a hole on the south side of the first rail about three feet long, about one foot wide and six to eight inches deep, and that each hole was not then full of snow. The coroner, the fireman on the locomotive, testified that it had been snowing and that there was snow on the ground. The witness Gandy, a brakeman on the train, believed that it had snowed but did not remember whether it was snowing at the time or not. The engineer which testified that he observed the automobile come up with the front end on the track, after which it stopped; that the locomotive struck the automobile at about the position of the front wheels; that

the automobile's front wheels were just over the rail; that it had been sleeting and snowing. The track foreman, Reynolds, testified that although the accident happened on Friday night, his first knowledge of it was on the following Monday morning; that on Friday night it had rained and snowed and there was ice on the ground; that immediately south of and parallel to the north rail in question there was a cross tie with an eight inch top surface and otherwise six by eight inches; that the crossing was heavily travelled; that there was a chuck hole shown in the photographs in evidence next to this cross tie but that such was not as deep as the one on the opposite side of the rail; that when the asphalt wears out or works out by virtue of traffic, there is a right angle drop next to the edge of such cross tie.

As to the first assignment of error relating to the ruling of the Court on the various motions for a directed verdict or for judgment notwithstanding the verdict, it is elementary that if there is any evidence which with all reasonable and legitimate inferences therefrom, when viewed in the light most favorable to the plaintiff tends to prove the necessary elements of the cause of the action, then the motions should be denied. Applying this rule to the charge that defendant did not maintain its crossing in a reasonably safe condition, it is obvious that there was evidence sufficient to warrant the case going to the jury. Likewise as to whether or not the hole, or a combination of the hole with sleet and snow, or solely the sleet and snow was the proximate cause of the damage, such likewise was a question for the jury and it was not error for the Court to deny the several motions.

As to whether or not the Court erred in denying the motion for a new trial on these two subjects, it cannot be

the automobile's front wheels were just over the rail; that it had been sleeting and snowing. The track foreman, Reynolds, testified that although the accident happened on Friday night, his first knowledge of it was on the following Monday morning; that on Friday night it had rained and snowed and there was ice on the ground; that immediately south of and parallel to the north rail in question there was a cross tie with an eight inch top surface and otherwise six by eight inches; that the crossing was heavily travelled; that there was a crack hole shown in the photographs in evidence next to this cross tie but that such was not as deep as the one on the opposite side of the rail; that when the asphalt wears out or works out by virtue of traffic, there is a right angle drop right to the edge of such cross tie.

As to the first assignment of error relating to the ruling of the court on the various motions for a directed verdict or for judgment notwithstanding the verdict, it is elementary that if there is any evidence which will reasonable and legitimate inferences therefrom, when viewed in the light most favorable to the plaintiff tends to prove the necessary elements of the cause of the action, then the motions should be denied. Applying this rule to the charge that defendant did not maintain its crossing in a reasonably safe condition, it is obvious that there was evidence sufficient to warrant the case going to the jury. Likewise as to whether or not the hole, or a combination of the hole with sleet and snow, or solely the sleet and snow was the proximate cause of the damage, such likewise was a question for the jury and it was not error for the Court to deny the several motions.

As to whether or not the Court erred in denying the motion for a new trial on these two subjects, it cannot be

said that the verdict was against the manifest weight of the evidence; the testimony as to the deterioration of the crossing resulting in one or more holes was amply supported by the evidence. As to whether or not the proximate cause of the damage was the result of the hole, result of the snow, or a combination of the same, such was a proper subject for the jury to pass upon and having so decided, the verdict should not be disturbed.

To distinguish this case from that of Berg v. New York Central Railroad Co., 323 Ill. App.221, 391 Ill.52, requires only a reading of these opinions. The applicable rule, however, which is pertinent to the incident case, is found in that of Comiskey v. Engel, 339 Ill.App.309, and Chapman v. Baltimore & O.R.Co.,340 Ill.App.475. This Court is of the opinion that the question of proximate cause was such as to be properly submitted to the jury and such finding was not against the manifest weight of the evidence.

Inasmuch as the Court did not err in its rulings on the various motions for a directed verdict and inasmuch as the verdict of the jury was not against the manifest weight of the evidence, the judgment entered on such verdict will be affirmed.

Affirmed.

said that the verdict was against the weightest weight of the evidence; the testimony as to the deterioration of the crops resulting in one or more holes was amply supported by the evidence. As to whether or not the proximate cause of the damage was the result of one hole, result of two holes, or a combination of the three, such was a proper subject for the jury to pass upon and having so decided, the verdict should not be disturbed.

To distinguish this case from that of Pere v. B. & L. Central Building Co., 263 Ill.App.[illegible] III.Sup., requires reading of these opinions. The Appellants rely, however, which is pertinent to the instant case, is found in this of Conlisky v. Bucal, 339 Ill.App.309, and Chapman v. Baltimore & O.R.R.Co., 340 Ill.App.475. This Court is of the opinion that the question of proximate cause was such as to be properly submitted to the jury, not such finding was for against the heaviest weight of the evidence.

Inasmuch as the court did not err in its rulings on the various motions for a directed verdict and inasmuch as the verdict of the jury was not against the heaviest weight of the evidence, the judgment entered on such verdict will be affirmed.

Affirmed.

3472 A

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D.1953 350 I.A. 324

General No. 9893 Agenda No. 21

William A. Econe, Sr., Administrator of the Estate of William A. Econe, Jr., deceased, Patricia Christopher and William Kasich; Plaintiffs.	Appeal from the Circuit Court of Macoupin County
# # #	
William A. Econe, Sr., Administrator of the Estate of William A. Econe, Jr., deceased, Appellee, vs. Adam Tenikat, Defendant-Appellant.	

Wheat, P. J.

This is an action for wrongful death brought by William A. Econe, Sr., Administrator of the Estate of William A. Econe, Jr., deceased, plaintiff-appellee, against Adam Tenikat, defendant-appellant, in which judgment was entered on jury verdict in favor of plaintiff for the sum of $8000.00. Motion for judgment notwithstanding the verdict and motion for new trial were denied, from which rulings this appeal follows.

It appears that on February 11, 1951, at about 12:45 A.M., the decedent, William A. Econe, Jr., was driving an automobile in a northerly direction on concrete state Route #4 in

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

3501A.324

Term, A.D.1953

General No. 9393 Abstract No. 71

William A. Boone, Sr., Administrator of the Estate of William A. Boone, Jr., deceased, Patricia Christopher and William Lawson;	
Plaintiffs.	Appeal from the Circuit Court of Sangamon County
v.	
William A. Boone, Sr., Administrator of the Estate of William A. Boone, Jr., deceased,	
Appellee,	
vs.	
Adam Tenikat,	
Defendant-Appellant.	

Wheat, P.J.d.

This is an action for wrongful death brought by William A. Boone, Sr., Administrator of the Estate of William A. Boone, Jr., deceased, plaintiff-appellee, against Adam Tenikat, defendant-appellant, in which judgment was entered on jury verdict in favor of plaintiff for the sum of $8000.00. Motion for judgment notwithstanding the verdict and motion for new trial were denied, from which ruling this appeal follows.

It appears that on February 11, 1951, at about 12:45 A.M., the decedent, William A. Boone, Jr., was driving an automobile in a northerly direction on concrete state Route #4 in

the vicinity of the Village of Sawyerville, Illinois. Riding with him at this time was Patricia Christopher, the only other occupant of the car. Approaching this highway from the east, forming a T intersection, was an oiled road which was one of the streets of Sawyerville at its outskirts. As the Econe car proceeded northerly toward this intersection the defendant, Adam Tenikat, was driving a Ford automobile in a westerly direction toward the concrete highway on the oiled street. With him in the front seat was one Andrew Sasso and in the rear seat of the two door car was Andrew Kolotila. The Tenikat car stopped for a stop sign on the north side of the oiled road at a point undetermined but east of Route #4. The defendant then observed the automobile of plaintiff's intestate proceeding from the south at a distance, he says, of several blocks. He then proceeded on to Route #4 with the intention of turning to his right, the north, but as all or part of his car was on the concrete his motor stalled, and using the car's momentum, he turned northwesterly at an angle of about forty-five degrees northwest. It is in dispute as to how far the car had proceeded across the concrete or as to whether or not the lights of his car were lighted, but in any event the automobile of plaintiff's intestate approaching from the south, swerved to the right or east avoiding striking the defendant's car and ran off of the concrete across the shoulder and into a tree, causing injuries to Econe, Jr., resulting in his death.

Only two errors are urged for reversal of this judgment. It is urged (1) that the Court erred in denying the defendant's motion for judgment notwithstanding the verdict for the reason that as a matter of law Econe, Jr., was not in the exercise of due care for his own safety and that as a matter of law defendant

the vicinity of the village of Lawrenville, Illinois. Riding with him at this time was Patrick Dorchopper, the only other occupant of the car. Approaching this highway from the east, forming a T intersection, was an oiled road which was one of the streets of Lawrenville at its outskirts. As the stone car proceeded northerly toward this intersection the defendant, Adam Tanner, was driving a Ford automobile in a westerly direction toward the concrete highway on the oiled street. With him in the front seat was one Andrew Kaczka. The Tanner car stopped for a stop sign on the north side of the oiled road at a point undetermined but east of Route 14. The defendant then observed the automobile of plaintiff's intestate proceeding from the south at a distance, he says, of several blocks. He then proceeded on to Route 14 with the intention of turning to his right, the north, but as all of part of his car was on the concrete his motor stalled, and using the car's momentum, he turned northwesterly as an angle of about forty-five degrees northeast. It is in dispute as to how far the car had proceeded across the concrete or as to whether or not the lights of his car were lighted, but in any event the automobile of plaintiff's intestate approaching from the south, swerved to the right or east avoiding striking the defendant's car and ran off of the concrete across the shoulder and into a tree, causing injuries to Boone, Jr., resulting in his death.

Only two errors are urged for reversal of this judgment. It is argued (1) that the Court erred in denying the defendant's motion for judgment notwithstanding the verdict for the reason that as a matter of law Boone, Jr., was not in the exercise of due care for his own safety and that as a matter of law defendant

was not negligent. (2) that the Court erred in denying the defendant's motion for a new trial in that the verdict is contrary to the manifest weight of the evidence on the question of plaintiff's due care and as to the negligence of the defendant. For a decision on these questions a brief review of the pertinent testimony is necessary.

Patricia Christopher testified on direct examination that she was riding in the front seat of the automobile driven by the decedent proceeding northerly on Route #4; that she saw an automobile with no tail lights lighted in the middle of the highway headed north; that she did not know if it was moving or not and did not see it enter Route #4. She said to the driver, "There is a car, be careful". The driver replied, "Where are his lights"; that he then swerved to the right; that she saw the tree in question and that is all she remembered. On cross examination she further testified that the roads were dry; she did not remember whether defendant's car was moving or standing still; that she would say it was standing still but would not say it was moving and that if it was moving it was very, very slow; that it did not move at any time while within her vision; that with reference to the center or the black line of Route #4, defendant's car was more to the right than to the left and mostly in the center; that it was approximately twenty feet away when she first saw it; that the car in which she was riding was going at average speed; that it slowed down before it got to the point where the defendant's car was by reason of the driver applying the brakes; that she was the first one to see the defendant's car and called the driver's attention to it at which time he then applied the brakes; that the car swerved to the right before passing the Tenikat car; that she did not know if the headlights were lighted on defendant's

was not negligent. (2) that the Court erred in denying the defendant's motion for a new trial in that the verdict is contrary to the manifest weight of the evidence on the question of plaintiff's due care and as to the negligence of the defendant. For a decision on these questions a brief review of the pertinent testimony is necessary.

Patricia Christopher testified on direct examination that she was riding in the front seat of the automobile driven by the defendant proceeding northerly on Route #4; that she saw an automobile with no tail lights lighted in the middle of the highway headed north; that she did not know if it was moving or not and did not see it under Route #4. She said to the driver, "There is a car, be careful". The driver replied, "There are his lights"; that he then swerved to the right; that she saw the tree in question and that is all she remembered. On cross examination she further testified that the roads were dry; she did not remember whether defendant's car was moving or standing still; that she would say it was standing still but would not say it was moving and that if it was moving it was very, very slow; that it did not move at any time while within her vision; that with reference to the center or the black line of Route #4, defendant's car was more to the right than to the left and mostly in the center; that it was approximately twenty feet away when she first saw it; that the car in which she was riding was going at average speed; that it slowed down before it got to the point where the defendant's car was by reason of the driver applying the brakes; that she was the first one to see the defendant's car and called the driver's attention to it at which time he then applied the brakes; that the car swerved to the right before passing the Tamiat car; that she did not know if the headlights were lighted on defendant's

car but she did not see any lights. The witness Leticia Langley testifying for the plaintiff stated that she lived near and north of the scene of the accident on the east side of Route #4; that she heard the noise of the collision while inside of the house after which she ran to the scene; that two young men whose names were unknown to her arrived about the same time as she did; that she thereafter saw an automobile on the highway at an angle, "Just catercornered"; it was almost in the center of the paved portion of the highway west of the decedent's car; there were no lights on this car. On cross examination she further stated that defendant's car was slightly west of the wrecked car and a little north headed in a general northerly direction. She further testified as follows: "Question - When you saw Mr. Tenikat's car what did you see as to whether or not it was entirely on the pavement or over to the west side? Answer - I could'nt tell whether some of the wheels were off altogether or not. It was sitting at an angle. To me it was sitting mighty crooked. Question - Would you say any of it was sitting on the east side of the black line? Answer - I think it was. It was at an angle where you couldn't pass around". Testifying for the plaintiff the witness Charles Hicks stated that he heard the noise of the collision as he was in a tavern near the intersection. In a few moments one Kolotila (a passenger in defendant's car) came in asking for an ambulance. The witness went to the scene of the crash; the tree with which decedent's car collided was seventy to eighty feet north of the north side of the oiled street; a car was sitting in the highway four to six feet north of the tree slightly over the black line on the right hand side of the pavement headed north; it was the only car in the vicinity other than that which crashed into the tree. There were no lights on the back end of this car. The

car but she did not see any lights. The witness testified [illegible]
tastily when for the slightly stated that the first man and [illegible]
of the scene of the accident on the east side of Jones St; then
she heard the noise of the collision while inside of the house
after which she ran to the scene; then two young men whom [illegible]
were unknown to her arrived about the same time as she did; that
the shortly was an [illegible] on the highway at an angle, [illegible]
[illegible]; it was almost in the center of the paved portion
of the highway west of the decedent's car; there were no lights
on this car. On cross examination the further testimony
[illegible]
decedent's car was slightly west of the wrecked car and a little north
headed in a general northerly direction. The further testimony
follows: Question - Now you saw or, Tomkins car went out and you
see as to whether or not it was entirely on the pavement or not
to the west side? Answer - I couldn't tell whether [illegible]
wheels were off altogether or not. It was sitting so at angle.
In me it was sitting slightly crooked. Question - Could you say
any of it was sitting on the east side of the white line?
Answer - I think it was. It was at an angle where you couldn't
pass around". Testimony for the plaintiff the witness Jennings
[illegible] stated that he heard the noise of the collision as he was
in a house near the intersection. In a few minutes one Bolotin
(a passenger in defendant's car) came in seeking for an ambulance.
The witness went to the scene of the crash; the truck with
defendant's car collided was standing in slightly [illegible] north of the
north side of the white stripe; a car was sitting in the highway
[illegible] to the east north of the line slightly over the white line
on the right hand side of the pavement headed north; it was the
only car in the vicinity other than that which crashed into the
tree. There were no lights on the back end of this car. The

stop sign on the north side of the street was about seventeen or eighteen feet east of the slab on Route #4; that at such point the driver of an automobile has vision for at least a half mile to the south. On cross examination he stated that as he walked to the collision scene he first saw the Tenikat car which was on the road eighteen to twenty inches over the black line to the east. It was a short distance north of the tree which was struck by the other car. He didn't see any lights on the Tenikat car. Except for some photographs this was in substance all of the plaintiff's evidence.

On behalf of the defendant the witness Andrew Sasso testified that he and Andrew Kolotila entered defendant's car that evening, which was a two door Ford; that he rode in the front seat with the driver Tenikat; that Kolotila rode in the rear seat; that while driving on the oiled road approaching Route #4 the car stopped for the stop sign; the driver looked both ways. There was a car coming from the south; that as defendant's car started to cross Route #4 the motor died, "So instead of turning real fast to the right he went on a forty-five degree angle"; that when decedent's car passed defendant's car the latter was either off or partly off of the concrete on to the west shoulder; that he did not see decedent's car make any turn and did not see the actual crash; that he stepped from defendant's car while it was still slowly moving and while it was on the west side of the black line and partially on to the shoulder; that the head and tail lights of defendant's car were lighted before the accident and that sometime later after the car had been moved the lights were tested and were in working order. The intersection was slick. He never saw decedent's car change speed or direction; that he saw tracks extending from the rear of decedent's car

stop sign on the north side of the street was about seventeen or eighteen feet west of the sign on north st., that is north of the driver of an automobile has vision for at least a mile prior to the south. On cross examination he stated that he is a witness to the collision across by first saw his father car which was on the road eighteen to twenty inches over the white line in his east. It was a short distance north of the street when was struck by the other car. He didn't see any lights on the Chevrolet. Except for some photographs this was in substance all of the plaintiff's evidence.

On behalf of the defendant the witness Harry Jackson testified that he and Andrew Pylkiski got in Pylkiski's car that evening, which was a two door Ford; that he sat in the front seat with the driver (Pylkiski); that Pylkiski took in the rear seat; that while driving on the wrong side of the road approaching the car proceed for the west sign; the driver turned sharply. There was a car coming from the south; that, as Pylkiski was entered to cross south of the middle line, he turned to the left and to the right to avoid a head-on collision; that when Jacobson's car passed Pylkiski's car the latter either off or partly off of the concrete on the north side; that he did not see Jacobson's car take any turns and he was the equal driver; that he stopped that Pylkiski's car; it was still slowly moving and while it was on the west side of the black line and partially on the concrete; that the headlight and tail lights of Jacobson's car were lighted before the accident and that somewhere later after the car had been moved the lights were tested and were in working order. The intersection was slick. He never saw Jacobson's car change speed or direction; that he saw tracks extending from the rear of Jacobson's car

after it crashed into the tree, which tracks extended southerly about a car length south of the tracks made by defendant's car. On cross examination he stated that decedent's car was probably a couple of blocks to the south when defendant's car was stopped at the highway; that the motor of defendant's car stalled when the car was somewhere on the pavement; that defendant attempted by using his starter to start the motor once or twice but failed. The car moved across the concrete in a northwesterly direction at a forty-five degree angle. Jack Hartnett, a state highway police officer testified that the decedent and Patricia Christopher were gone when he reached the scene of the accident; that the intersection of Route #4 was icy and slick; that defendant's car had been moved a considerable distance to the east of Route #4 and that the lights turned on and off in proper working order; that there were no marks on defendant's car indicating any contact with the other car; that the skid marks of decedent's car began about one hundred forty feet north of the oiled road. The witness Andrew Kolotila testified that he was a passenger in the rear seat of defendant's car; that when the car stopped for the stop sign in question decedent's car was two or three blocks to the south; that defendant put his car in motion and started to turn north, the motor stalled, but with the momentum of the car it proceeded north and west but mostly west across Route #4; that the pavement was icy. Decedent's car was going fifty or sixty miles per hour. The lights on defendant's car were lighted; that the tracks of decedent's car after crossing the tracks made by defendant's car, turned off to the east to where the car struck a tree; that defendant's car was south of the beginning of the skid marks. There was no contact between the two automobiles. On cross examination he stated that defendant's car

after it crashed into the tree, which circle intended southerly about a car length north of the track made by defendant's car. On cross examination he stated that defendant's car was probably a couple of places to the south when defendant's car was stopped at the railway; that the motor of defendant's car stalled when the car was somewhere in the pavement; that defendant either had by using his starter or shaft the motor dead or which was stalled. The car moved across the concrete in a northwesterly direction at a forty-five degree angle. Jack Barnett, a state highway patrol officer testified that the defendant and passenger were gone when he reached the scene of the accident; that the intersection of route 14 was icy and slick; that defendants car had been moved a considerable distance to the east of route 14 and that the lights turned on and off in proper working order; that there were no marks on defendant's car indicating any contact with the other car; that the skid marks of defendant's car began about one hundred feet north of the oilad road. The witness Andrew Kolnitz testified that he was a passenger in the rear seat of defendant's car; that when the car stopped in the stop sign in question defendant's car was two or three inches or more south; that defendant put his car in motion and started to turn north, the motor stalled, but with the momentum of the car it proceeded north and went out south across route 14; that the pavement was icy. Defendant's car was going fifty to sixty miles per hour. The lights on defendant's car were illuminated; that the tracks of defendant's car after crossing the tracks made by defendant's car, turned off to the west to where the car struck a tree; that defendant's car was south of the beginning of the skid marks. There was no contact between the two automobiles. On cross examination he stated that defendant's car

was off of the highway to the west when it finally stopped; that he did not know if the tail lights were lighted at any time until he saw them checked by the state police officers after the accident; that from the time the motor of defendant's car stalled the witness constantly looked to the south so that as far as he was concerned the headlights of defendant's car could have been out at the time the Econe car approached. The defendant Adam Tenikat testified that he was a night police officer at Benld, Illinois; that he had owned the 1937 two door Ford in question for about a week before the accident; that as he approached Route #4 on the oiled road the witness Sasso was riding at his right in the front seat and the witness Kolotila in the rear seat; that the bright lights of the car were lighted as he approached Route #4 and stopped for the stop sign, at which time he saw a car coming from the south about two blocks away. He started on to the pavement; the engine died but his car never came to a full stop on the pavement. He thereafter stopped on the west side of the pavement headed northwest. He never saw the Econe car after the first time above mentioned; that his car was on the west side of the pavement when the Econe car passed by; that when he got out of his car he turned all the lights off; that the pavement was icy; that there is a down grade on the oiled road from the stop sign westerly to Route #4. On cross examination he stated that he was on the hard road when the motor stalled; that all of the car was not yet on the hard road; that he had just made a slight turn; that when the motor stalled the car was on the black line; the car was still rolling; that he crossed the pavement going slightly northwest but that when the car finally stopped it was headed north. Except for some photographs this was in substance the testimony on behalf of the defendant.

was off of the highway on the west when he finally stopped; that he did not know if the tail lights were lighted at any time until he saw them reflected by the white paint stripes along the roadbed; that from the time the motor of defendant's car stalled the witness practically looked on the scene so that so far as he was concerned the headlights of defendant's car could have been on as the time the door car approached. The defendant also testified that he was a night police officer at Lodi, Illinois; that he had owned the 1927 Ford involved in question for about a week before the accident; that as he approached north on the called road the witness Jacob was sitting at his right in the front seat and the witness Kolodzie in the rear seat; that the bright lights of the car were lighted as he approached to be, and stopped on the east side, at which time he saw a car coming from the south about two blocks away. He started on to the pavement; the engine died but his car never came to a full stop on the pavement. He therefore stopped on the west side of the pavement headed northwest. He never saw the Ford car after the first time above certified; that his car was on the west side of the pavement when the Ford car passed by; that when he got out of his car he turned all the lights off; that the pavement was dry; that there is a down grade on the Ottle road from the stop sign westerly to Route 94. On cross examination he stated that he was on the hard road when the motor stalled; that all of the car was not yet on the hard road; that he had just made a right turn; that when the motor stalled the car was on the Ottle line; the car was still rolling; that he crossed the pavement going slightly northwest but that when the car finally stopped it was headed north. Except for some photographs this was is substance the testimony on behalf of the defendant.

As to the first assignment of error, that is a matter of law, administrator of plaintiff's intestate had failed to prove that decedent was in the exercise of due care for his own safety or that defendant was negligent, an answer to this requires only an analysis of the testimony above set forth. It is elementary that considering the testimony in the light most favorable to the plaintiff, with all reasonable inferences which may be drawn therefrom, then if there is any testimony reasonably supporting the plaintiff's cause of action the same becomes a question of fact and should be submitted to the jury. The converse rule is that where the minds of all reasonable men of fair understanding might reach the same conclusion upon analysing the evidence, then the same becomes a question of law and not of fact. In the instant case it appears that it cannot be said as a matter of law that plaintiff's intestate was guilty of a lack of due care or that defendant was free from negligence by reason of which such became a question to be passed upon by the jury. It is next necessary to determine whether, as raised upon the motion for a new trial, the judgment was contrary to the manifest weight of the evidence. This Court cannot say that such is the case and feels that inasmuch as there was sufficient evidence for the case to go to the jury, there was also ample evidence upon which a verdict could be supported by the manifest weight of the evidence as to the due care of plaintiff's intestate and as to defendant's negligence. Accordingly the judgment of the Circuit Court is affirmed.

Affirmed.

As to the first assignment of error, that is a matter of law. Administrator of plaintiff's intestate had failed to prove that decedent was in the exercise of due care for his own safety or that defendant was negligent. An answer to both requires only an analysis of the testimony above set forth. It is elementary that considering the testimony in the light most favorable to the plaintiff, with all reasonable inferences which may be drawn therefrom, then if there is any testimony reasonably supporting the plaintiff's cause of action the same becomes a question of fact and should be submitted to the jury. The converse rule is that where the minds of all reasonable men of fair understanding might reach the same conclusion upon analyzing the evidence, then the same becomes a question of law and not of fact. In the instant case it appears that it cannot be said as a matter of law that plaintiff's intestate was guilty of a lack of due care or that defendant was free from negligence by reason of which such became a question to be passed upon by the jury. It is next necessary to determine whether, as related upon the motion for a new trial, the judgment was contrary to the manifest weight of the evidence. This Court cannot say that such is the case and feels that inasmuch as there was sufficient evidence for the case to go to the jury, there was also ample evidence upon which a verdict could be supported by the manifest weight of the evidence as to the due care of plaintiff's intestate and as to defendant's negligence. Accordingly the judgment of the Circuit Court is affirmed.

Affirmed.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

Abstract

May Term, A. D. 1953.

A. 3482

General No. 9868

Agenda No. 7

FRANK HART, Plaintiff-Appellee,	)	350 I.A. 325
vs.	)	Appeal from Circuit Court of Greene County
JOHN M. GOEBELT and LEONA GOEBELT, Defendants-Appellants.	)	

Carroll, J.

Plaintiff brought this action in the Circuit Court of Greene County to recover damages sustained as the result of fraud, deceit and misrepresentations alleged to have been practiced upon him by the defendants. A jury trial was had, resulting in verdicts for the plaintiff of $1,250.00 against defendant, John M. Goebelt, and of $500.00 against defendant, Leona Goebelt. Motion for a new trial was overruled and judgments entered and the defendants have appealed from these judgments.

The facts alleged in the complaint as constituting fraud on the part of the defendant, John M. Goebelt, are in substance that he made false statements to the plaintiff concerning the collectibility of a certain judgment in the amount of $1,042.00 in favor of plaintiff and defendant, Leona Goebelt; that the defendant, John M. Goebelt, knew said statements to be false when he made them; that they were made for the purpose of deceiving the plaintiff and inducing him to release said judgment for a nominal sum of money; that plaintiff believed and relied upon said statements and was induced thereby to release said

Abstract

Decided June, 1. C. 1920.

Docket No. 9606 Answer No. 1

IN THE CASE	
Plaintiff-appellee,	
vs.	
John F. Doe, defendant and John Doe, garnishee,	
defendants-appellees.	

85014.325

Appeal from
Circuit Court of
Jackson County

Carroll, J.

Plaintiff brought this action in the Circuit Court of Jackson County to recover wages earned by the defendant in the form, detail and classification subject to date been presented upon the in the garnishee. A jury trial was had, resulting in a verdict for the plaintiff in $1,250.00 against defendant, John F. Doe, and in $300.00 against garnishee, John Doe. Motion for a new trial was overruled and judgment entered and the defendants in error brought this appeal.

The facts alleged in the bond for the garnishment filed on the part of the plaintiff, John F. Smith, are in substance that the defendant John Doe is indebted to the plaintiff upon a note for $1,000.00 in favor of plaintiff and Jackson County, Illinois, dated, June 2, 1920, payable on demand, and that the defendant John Doe made under the garnishee made for the purpose of evading the payment of said note to defeat said judgment for a deficient sum of money; and plaintiff believed and believes that said garnishee and said defendant intend to commit fraud.

judgment for $250.00; that when the defendant made said statements he had been paid the sum of $1,062.00 by the judgment debtor with which to obtain a release from the plaintiff.

The charges of fraud as against the defendant, Leona Goebelt, appearing in the complaint were that she was a joint custodian of plaintiff's bank account in the Illinois State Bank of East Alton under an agreement with plaintiff whereby she was to look after the moneys of plaintiff and make same available to him according to his needs; that she had no interest except in her fiduciary capacity in the moneys in said bank account, and that these moneys were the sole property of plaintiff; that the defendant, Leona Goebelt, in violation of her duties as such fiduciary, withdrew all of the moneys in said bank account, amounting to $340.22, and converted same to her own use.

The answers of the defendant deny all charges of fraud or misrepresentation as made in the complaint.

The material issues of fact submitted to the jury for decision in the case against John M. Goebelt were: (1) The ownership of the judgment in favor of plaintiff and Leona Goebelt; (2) whether certain statements were made by defendant to plaintiff concerning the value of said judgment, and their truth or falsity; (3) whether, if said statements were false, the defendant knew them to be so; (4) whether said statements were made by the defendant for the purpose of defauding the plaintiff and inducing him to release said judgment for much less than its actual value; and (5) whether plaintiff believed said statements, and relying thereon, did release the said judgment.

The issues presented in the case against Leona Goebelt appear to have been: (1) whether the funds in the savings account in the Illinois State Bank of East Alton were the sole property of the plaintiff or were jointly owned by defendant and plaintiff; (2) whether insofar as these funds were concerned the defendant

judgment for $650.00; but, when the defendant made said payments he had been paid the sum of $1,062.00 by the judgment debtor sheriff to obtain a release from the plaintiff.

The charge of fraud as against the defendant, based upon, inasmuch as the complaint says that the sum of $ joint satisfaction of plaintiff's claim against the Illinois Trade Mark of that firm under an agreement with defendant whereby the was to look after the money of plaintiff and was authorized to in accordance to his needs; that he had no interest (except his fiduciary capacity) in the money in said account, and that these moneys were the sole property of plaintiff; that the defendant, from motives, in violation of her duties as a fiduciary, withdrew all of the moneys in said bank account, amounting to $1,062.62, and converted same to her own use.

The answer of the defendant, they all claims of fraud or misrepresentations by her in the complaint.

The principal issues of fact submitted to the jury for resulting in the verdict in favor of plaintiff were: (1) The ownership of the judgment in favor of plaintiff was joint-(2) whether certain statements made by defendant to plaintiff concerning the value of said judgment, and their priority; (3) whether, if said statements were false, the defendant knew them to be so; (4) whether full statements were made by the defendant for the purpose of deceiving the plaintiff and causing him to release said judgment for less than the actual value; and (5) whether plaintiff believed said statements, and relying thereon, did release the said judgment.

The large preponderance in the case against the contention appear to have been: (1) whether the funds in the savings account in the Illinois Trust and Savings Bank were the sole property of the plaintiff or were jointly owned by defendant and plaintiff; (2) whether the moneys in those funds were appropriated the defendant

in her relationships with the plaintiff acted in a fiduciary capacity: and (2) whether in violation of her duty as a fiduciary she withdrew all of the money in said bank account and converted same to her own use.

While defendants assign numerous errors on this appeal, their principal contentions are that the verdicts are contrary to the evidence and that the jury were improperly instructed as to the applicable law.

From the record it appears that much of the evidence bearing upon the facts in issue were in conflict. A considerable portion of the briefs and arguments submitted by the parties on this appeal is devoted to their respective discussions of the evidence and the conclusions to which they contend it logically leads. Since no argument as to the improper admission of evidence is advanced, we will refrain from making any detailed analysis thereof. The rule which the Court must follow is that the verdict of a jury should not be set aside by a reviewing court unless such verdict was clearly against the manifest weight of the evidence. Chapman v. Baltimore and O. R. Co., 340 Ill. App. 475; Gavin v. Keter, 278 Ill. App. 308. It must be recognized that a trial court in weighing the evidence upon consideration of a motion for a new trial has advantages that are denied to an Appellate Court. One of the factors which a trial court may employ in judging the credibility of evidence is the opportunity afforded it to personally observe the witnesses while testifying. It is because of the advantageous position in which a trial court is situated in weighing the testimony of witnesses that the granting of a new trial is largely discretionary with the trial court, and unless there is a clear abuse of such discretion, its decision will not be disturbed. Parke v. Lopez, 306 Ill. App. 486; Lepkowski v. Laukemper, 317 Ill. App. 304. Applying these established guides to the case at hand, we cannot see that the verdict of the jury on consideration of the evidence

to act rationally and with the stability shown in a judicial capacity; and (2) whether in violation of his duty as a judicial officer he allowed all of the comment in said book, whether and convinced them to act on it.

While defendants basing numerous errors on this appeal, their principal contentions are that the verdicts are contrary to the evidence and that the judge were improperly instructed as to the applicable law.

For the reasons to follow, this court of its evidence leaning upon the facts in large part in conflict. A considerable portion of the brief has argument objected to the errors on this appeal is devoted to their respective discussions of the evidence and the conclusions to which each claimed it irresistibly leads. Since to attempt to do so would amount to weighing evidence in advance, we will refrain from making any analysis thereof. The rule which the court must follow in such the verdict of a jury upon the set forth on a criminal court unless the verdict was clearly against the weight of the evidence. Clayton v. Kilbourne and Jacobs, 3 Ky. Law, 111. 1881; Davis v. Tyler, 27 Ky. Law. 1008. It was the exclusive that a trial court in ruling on motions for a directed verdict or a motion for a new trial has absolutely no discretion to do so unless there. The of the jurors which a trial court may consider in judging the probability of evidence in the possibility afforded it to perform its duties in a manner well satisfying. It is because of the advantageous position in which a trial court is placed in weighing the testimony of witnesses and the reversing of a new trial is formally stereotyped when the trial court, and unless there is a clear abuse of such discretion, the decision will not be disturbed. Ratliff v. Lewis, 300 Ky. 1. 1944; Independent v. Lawrence, 217 Ky. 1922. Following these established guides to the best of court, we cannot say that the verdict of the jury on consideration of the evidence

before it was manifestly against the weight thereof. Neither are we of the opinion that the record discloses any indication that the trial judge abused his discretion in denying the motion of defendants for a new trial.

Defendants complain that 13 out of plaintiff's 19 instructions were improperly given. It is particularly contended that the giving of Plaintiff's instruction No. 4 constitutes reversible error, in that said instruction did not embody all of the essential elements of fraud, and that it was in effect peremptory. With such contention we cannot agree. An examination of this instruction discloses that it informed the jury that if they found a fiduciary relationship to exist between Leona Goebelt and the plaintiff, and that in dealing with the subject matter of said relationship she gained an advantage to herself, she must be deemed guilty of fraud. The law is that where a fiduciary relationship is established and a person by reason of such relationship derives an advantage to himself, the burden is then cast upon him to show good faith. Commercial Merchants Bank v. Kloth, 360 Ill. 294. We have carefully examined all of the instructions, and feel that the same fairly advised the jury on the law as it applied to the facts in issue. Some complaint is made by the defendants that under the proofs the plaintiff was not entitled to punitive damages. Since we are convinced that the jury under the evidence was warranted in finding the defendants guilty of fraud, it follows that the jury properly assessed exemplary damages.

Finding nothing in this record from which we could reach any reasonable conclusion that the defendants did not receive a fair trial, we are of the opinion that the judgments of the Circuit Court of Greene County in favor of the plaintiff and against the defendants should be and are affirmed.

Affirmed.

Abstract

A 3492

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1953

General No. 9880

Agenda No. 13

Ruby Tucker, Plaintiff-Appellee,	)	
vs.	)	Appeal from Circuit Court of Jersey County
James E. Kallal, Defendant-Appellant.	)	

350 I.A. 325

CARROLL, J.

This is an appeal by defendant-appellant from a judgment of the Circuit Court of Jersey County entered on a jury verdict in favor of plaintiff for the sum of $8,000.00 in an action for personal injuries sustained by the plaintiff in an automobile accident.

The allegations of the complaint in substance were that the plaintiff, while riding as a passenger in an automobile driven by her daughter, Shirley Tucker, and while in the exercise of due care and caution, was injured as the result of a collision between the car in which she was riding and one driven by the defendant, and that the collision was caused by the negligence and carelessness of the defendant. The defendant's answer admitted that the plaintiff was a passenger in a car driven by her daughter, denied due care on the part of the plaintiff and the specific charges of negligence as laid in the complaint, and affirmatively alleged that plaintiff's daughter at the time of the accident was operating the said car as the servant and agent of the plaintiff, and that said driver as the agent of plaintiff failed to exercise due care for the safety of the plaintiff. A replication to the affirmative defense was filed by the plaintiff.

The first proposition urged by the defendant is that

STATE OF NEW YORK
APPELLATE COURT
TAKE NOTICE.

New York, ... 2. 1923

General No. 9860 Appeal No. 17

Roy Tower, Plaintiff-respondent,	)	Appeal from Circuit Court of Jersey County, County,
vs.	)	
Owen C. Smith, Defendant-appellant.	)	

Opinion. T.

This is an appeal by defendant-appellant from a judgment of the Circuit Court of Jersey County entered on a jury verdict in favor of plaintiff for the sum of $5,000.00 in an action for personal injuries sustained by the plaintiff in a motorcycle accident.

The allegations of the count for in substance somewhat the plaintiff, while riding as a passenger in an automobile driven by our defendant, Jersey Tower, and while in the exercise of due care and caution, was injured as the result of a collision between his car in which he was riding and one driven by the defendant, and that the collision was caused by the negligence and carelessness of the defendant. The defendant's answer admits that the plaintiff was a passenger in a car driven by the defendant, denied the care on the part of the plaintiff and the possible negligence of the defendant as laid in the complaint, and affirmatively alleged that plaintiff's own negligence in the time of the accident was contributing the sole cause of the injury and damage of the plaintiff, and that defendant is not a party of plaintiff being in exercise due care for the safety of the plaintiff. A replication to the affirmative defense was filed by the plaintiff.

The first proposition urged by the defendant is that

the judgment below should be reversed and judgment entered here in bar of plaintiff's action. In the alternative he seeks reversal of the judgment and a new trial. In support of his first proposition, defendant contends that as a matter of law, the plaintiff was bound by the conduct of the driver of the car; that the driver of the said car was guilty of contributory negligence; and that plaintiff did not exercise due care for her own safety.

The negligence, if any, of the driver of the car in which plaintiff was a passenger, could not be imputed to her unless said driver was operating said car as the agent and servant of the plaintiff. Smithers v. Henriquez, 368 Ill. 588; Arkin v. Page, 287 Ill. 420. The question as to whether the relationship of principal and agent or master and servant existed between the plaintiff and the said driver could not become one of law unless it could be said that all reasonable minds would reach the conclusion that the evidence in the record pertaining to that issue did establish such relationship. Such situation can only exist where the facts bearing on an issue are not in dispute. In this case, the defendant raised as an affirmative defense the issue of an agency relationship between the plaintiff and the driver of the car. Evidence was introduced on what was a controverted question of fact. What facts might constitute agency is a question for the Court. But the determination as to whether the evidentiary facts and circumstances in this record warrant the ultimate conclusion that the driver was the agent and servant of the plaintiff involved only a question of fact for the jury. Shannon v. Nightingale, 321 Ill. 168; Kavale v. Morton Salt Co., 329 Ill. 445.

With reference to the defendant's further contention that plaintiff, as a matter of law, was not shown to be in the exercise of due care for her own safety, it may be said that to so hold, the Court must be able to say that all reasonable men honestly judging the evidence and legitimate inferences arising

the judgment below should be reversed and judgment entered in her of plaintiff's motion. In the alternative, he prays reversal of the judgment and a new trial. In support of his first proposition, defendant contends that as a matter of law, the plaintiff was moved by the conduct of the driver of the car; that the driver of the car was not guilty of contributory negligence; and that plaintiff did not exercise due care for her own safety.

The evidence, it may, of the crux of the case is which plaintiff was a passenger, could not be imputed to her unless said driver was operating said car as the agent and servant of the plaintiff. Williams v. Kerrigan, 766 ill. App. 2d; Lewis v. Ryan, 227 ill. 410. The question is to whether the relationship of servant and master or master and servant existing between the plaintiff and the said driver could not become one of law unless it could be said that all reasonable minds would draw conclusions from evidence in the record presented. If so, then did exclusive sole evidence. Some circumstances are only sufficient to raise question of law and not of fact. In this case, the defendant relies on an affirmative finding the lack of an agency relationship between the plaintiff and the driver of the car. Evidence was introduced on that point, a conflicting question of fact. That fact alone constitutes error in a motion for new trial. The trial court's decision is on matter of credibility and circumstances in fact. Proper method was allowed - examine the driver and the other two witnesses to the transaction involved only a question of law for the jury. Jackson v. Chicago, 325 ill. 240; Lewis v. Ryan et al., 327 ill. 445.

With reference to the defendant's further contention that plaintiff, as a matter of law, was not shown to be in the exercise of due care for her own safety, it is not in well taken or said. The facts must be kept in mind that all reasonable inferrity implying from evidence and legitimate inferences arising

therefrom would agree that the plaintiff was not at the time of the injury in the exercise of due care and caution. Pollard v. Broadway Central Hotel Corp., 353 Ill. 312; Ziraldo v. Lynch Co., 365 Ill. 197. Plaintiff's testimony was that at the time of the accident, she was being driven to her home from a doctor's office where a fish hook was taken from her finger; that she was not feeling good; that she sat with her head back on the seat; that as the car approached the intersection of Liberty and Mulberry Streets, she felt the car swerve; that at that time, she thought the car was practically through the intersection; and that there was a collision. On cross examination, she stated that when the car swerved, she said: "Watch out, Sis. Here comes a car." There seems to be no evidence here that plaintiff was aware of any danger until she saw the other car, at which time she warned the driver. Whether the conduct of the plaintiff constituted lack of care was a question of fact. There is no invariable rule that a passenger who fails to warn the driver of an auto of danger in time to avoid it is guilty of contributory negligence. Budek v. City of Chicago, 279 Ill. App. 410; Moore v. Jansen and Schaefer, 265 Ill. App. 459.

We therefore conclude that both of the issues as to contributory negligence on the part of the plaintiff and as to the evidence of an agency relationship between her and the driver of the car were properly submitted to the jury.

The refusal of the trial court to submit to the jury the issue of the driver's negligence by special interrogatory and the giving and refusing of certain instructions are assigned as error warranting the granting of a new trial.

The defendant submitted and the Court gave a special interrogatory requiring the jury to answer whether the driver of the car in question was at the time of the accident the agent and servant of the plaintiff. This interrogatory was answered in the negative. The defendant submitted a further interrogatory

therefore would appear that the plaintiff was not at the time of the injury in the exercise of due care and caution. Tolbert v. Kansas City Central Ford., 251 Ill. 312; Pinelle v. Lyman Co., 265 Ill. 197.

Plaintiff's testimony was that at the time of the accident, she was being driven to her home from a doctor's office where a film had been taken from her finger; that she was not feeling good; that she sat with her head back on the seat; that as the car approached the intersection of Liberty and Mulberry Streets, she felt the car bounce; that at that time, she thought the car was practically through the intersection; and that there was a collision. On cross examination, she stated that when the car bounced, she said: "Motor out, Sis. Here comes a car." There seems to be no evidence here that plaintiff was aware of any danger until she saw the other car, at which time she warned the driver. Whether the conduct of the plaintiff constituted lack of care was a question of fact. There is no invariable rule that a passenger who fails to warn the driver of an auto of danger is ipso facto guilty of contributory negligence. Wabash v. City of Chicago, 229 Ill. App. 410; Moore v. Lawson and Chandler, 265 Ill. App. 59.

We therefore conclude that both of the issues as to contributory negligence on the part of the defendant and as to the existence of a causal relationship between her and the injury of the car were properly submitted to the jury.

The remaining of the trial court to submit to the jury the issue of the driver's negligence by special interrogatory and the giving and refusing of certain instructions are said to be error warranting the granting of a new trial.

The defendant objected and the court gave a modified interrogatory requiring the jury to answer whether the driver of the car in question was at the time of the accident the agent and servant of the plaintiff. This interrogatory was answered in the negative. The defendant objected a further interrogatory

which would have required the jury to answer whether the driver of the car in question was in the exercise of due care and caution while driving and operating the said car. The Court refused to give this special interrogatory.

The general rule is that special interrogatories are not proper unless some answer responsive thereto would be inconsistent with some general verdict. Chicago & A. R. R. Co. v. Harrington, 192 Ill. 9. In this case the negligence of the driver was controlling only in case such negligence was imputable to the plaintiff. The answer to the refused interrogatory therefore could only control the general verdict in the event the jury answered the given interrogatory in the affirmative. Standing alone, an answer to this interrogatory could not control the general verdict. It may also be noted that the refused interrogatory was defective in form in that it failed to limit the conduct of the driver to the time of the accident or immediately prior thereto. In view of the answer made by the jury to the interrogatory which was given, we do not believe the trial court erred in refusing to give the second interrogatory.

Consideration will now be given to the contention of the defendant that the jury was not properly instructed as to the law applicable to the facts in the case. The defendant directs particular complaint to plaintiff's Instructions Nos. 4, 5, and 8. Instruction No. 4 was as follows: "The Court instructs the jury that even if you believe from the evidence in this case that the driver of the automobile in which plaintiff had been riding was guilty of negligence which contributed to the injury in question, if any, if you further believe from the evidence that the plaintiff was not by her conduct in any way the cause of such negligence on the part of the driver of the automobile in which plaintiff had been riding and omitted no reasonable or ordinary care on her part for her own safety under all the circumstances in evidence

before you, then such negligence, if any, on the part of the driver of said automobile in which plaintiff had been riding cannot be charged against or imputed to the plaintiff in this suit." There is no disputing that this instruction correctly states the law in a case where there is no issue upon which evidence has been introduced as to whether the driver was the agent or servant of the plaintiff. Plaintiff cites the case of Thompson v. Atchison, T. & S. F. Ry. Co., 258 Ill. App. 123. In that particular case there could be no question as to the applicability of the instruction under consideration, since no issue of imputed negligence was involved. It would seem that plaintiff's Instruction No. 4 in effect informed the jury that the issues of an agency relationship between the plaintiff and her driver should be ignored.

Plaintiff's Instruction No. 5 appears to correctly state the law applicable in this case governing the rights of vehicles approaching an intersection.

It might be contended that plaintiff's Instruction No. 8 tended to cure any error committed in the giving of Instruction No. 4. We do not believe such contention can prevail. Instruction No. 8, after correctly stating the law with reference to the imputation of negligence of a driver of a car to a passenger, concludes with a recital of an abstract proposition of law concerning the proof necessary to establish the relationship of master and servant or principal and agent. The rule of law contained in this instruction refers to a valid contract of employment between the parties. This language would seem to exclude any evidence in the case consisting of circumstances which might give rise to the conclusion that the driver of the car in question was in fact the agent of the plaintiff and under her direction and control, despite the fact that there is no evidence of a formal contract between the parties. It is true that an instruction based upon one theory of a case need not contain all hypothetical elements contained in the theory of the opposing party. Nevertheless, the

before you, some negligence, if any, on the part of the driver of said automobile in which plaintiff had been riding, cannot be charged against or imputed to the plaintiff in this suit." There is no dispute that this instruction correctly states the law in a case where there is no issue upon which evidence has been introduced as to whether the driver was the agent or servant of the plaintiff. Plaintiff cites the case of Jackson v. Atchison, T. & S. F. R. Co., 252 Ill. 100, 124. In that particular case there could be no question as to the applicability of the instruction under consideration, since no issue of imputed negligence was involved. It would seem that plaintiff's instruction No. 4 is in effect informing the jury that the issue of an agency relationship between the plaintiff and her driver cannot be litigated.

Plaintiff's instruction No. 5 appears to correctly state the law applicable in this case governing the rights of vehicles approaching an intersection.

It may be contended that plaintiff's instruction No. 6 tended to cure her error included in the giving of instruction No. 2. We do not believe that contention can prevail. Instruction No. 2, after correctly stating the law with reference to the imputation of negligence of a driver of a car to a passenger, concludes with a recital of an abstract proposition of law concerning the proof necessary to establish the relationship of master and servant or principal and agent. The rule of law contained in this instruction refers to a valid contract of employment between the parties. This language would seem to exclude any evidence in the case concerning of circumstances which may give rise to the conclusion that the driver of the car in question was in fact the agent of the plaintiff and under her direction and control, despite the fact that there is no evidence of a formal contract between the parties. It is true that an instruction based upon one theory of a case need not contain all hypothetical elements contained in the theory of the opposing party. Nevertheless, the

general rule is that instructions must not ignore evidence upon an issue of fact. It is also the rule that instructions should not be in conflict as the jury should not be left to determine which of two contradictory instructions correctly recites the law to be applied in the case under consideration. Bald v. Nuerberger, 267 Ill. 616. As was said in Reivetz v. Chicago Rapid Transit Company, 327 Ill. 207: "The office of instructions is to give information to the jury concerning the law of the case for immediate application to the subject matter before them. The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions." We think the above quotation might well be applied to the instructions in this case. In this case, there seems to be serious doubt that the jury were properly instructed as to the law applicable to the evidence in the record.

Defendant's refused instruction did not correctly state the law and was properly refused by the Court.

The defendant further urges that the verdict of the jury was excessive. In view of our conclusion that a new trial should be granted in this case, it will be unnecessary to give consideration to the amount of the verdict.

Being convinced that the jury in this case were not properly instructed, and that therefore the defendant did not receive a fair trial, the judgment of the Circuit Court of Jersey County is reversed and the cause remanded for a new trial.

Reversed and remanded.

[illegible] that instructions such as these evidence some [illegible] issue of fact. If it is the rule that instructions should not be in conflict as the jury should not be left to speculate which of two contradictory instructions correctly states the law to be applied in the case under consideration, Lynn v. [illegible], 267 Ill. 516. It was held in Bartels v. Chicago Rapid Transit Company, 321 Ill. 207: "The effect of instructions is to give information to the jury concerning the law of the case for immediate application to the evidence before them. The fact, then, is not what tendency the instruction or series of instructions attribute to the instructions, but how did it in fact impel the evidence before them and the conclusions of the trial. Instructions not being evidence, improper will nevertheless be taken as those upon which the jury will be guided in the determination of the issues in this case. In this case, there could be no serious doubt that the jury were properly instructed as to the law applicable to the evidence in the record.

Defendants' refusal to provide did not correctly state the law and was properly refused by the court.

The defendants further contend that the verdict of the jury was excessive. In view of our conclusion that a new trial should be granted in this case, it will be unnecessary to give consideration to the amount of the verdict.

Being convinced that the jury in this case were not properly instructed, and that therefore the defendant did not receive a fair trial, the judgment of the Circuit Court of Lake County is reversed and the cause remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

A 3502

Abstract

May Term, A. D. 1953

General No. 9897

Agenda No. 22

350 I.A. 326

PEOPLE ex rel. JEAN MATHIAS, Plaintiff-Appellee,

vs.

DONALD MATHIAS, Defendant-Appellant.

Appeal from Circuit Court of Moultrie County

Carroll, J.

Petitioner-appellee filed her petition for a writ of habeas corpus in the Circuit Court of Moultrie County for the purpose of regaining custody of her daughter, aged two years.

A writ issued directed to Donald Mathias, father of the child and husband of petitioner, who had taken the child from petitioner without her consent. Upon a hearing on the petition and return thereto, the Court ordered that the custody of the child be awarded to petitioner. From such order the defendant brings this appeal.

The petitioner and respondent were married in June, 1947. They separated in December, 1951, and have lived separate and apart since that date. Glenna Dianne Mathias, the child for whose custody the parties are contesting in this action, was born in February, 1948. She had been in her mother's custody from the date of her birth until July 5, 1952, when the respondent forcibly took her from the mother's home in Decatur.

Where a child is of tender years, its care and custody are usually entrusted to the mother. The reason that this is done is because the mother is better adapted for such responsibility. People v. Hickey, 86 Ill. App. 20. It is only where there is evidence of unfitness on the part of the mother which is so

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

September Term, A. D. 1952

Docket No. 5697 | Docket No. 12

PEOPLE ex rel. [illegible], petitioner-appellee,	
vs.	Appeal from Circuit Court of Moultrie County
[illegible], Sheriff of Moultrie County,	
Respondent-appellant.	

Carroll, J.

Petition-appellee filed her petition for a writ of habeas corpus in the Circuit Court of Moultrie County for the purpose of regaining custody of her daughter, aged two years.

A writ issued directed to Donald Atkins, father of the child and husband of petitioner, who had taken the child from petitioner without her consent. Upon a hearing on the petition and return thereto, the court ordered the husband of the mother to surrender the child to petitioner. From a decree to order the defendant takes this appeal.

The petitioner and respondent were married in June, 1947. They separated in June, 1951, but were first separated for short periods in 1950. During these periods, he could for whom contacts the mother's [illegible] on the petition, was born in February, 1952. The child lived in her father's custody from the date of her birth until July 3, 1952, when her permanent residence was from the mother's home in Sullivan.

Since a child is of tender years, the mother and custody are usually entrusted to the mother. The rule that the father is presumed to be better entitled for such parentage. Phoenix v. Phoenix, 56 Ill. App. 60. It is the duty of the court to ascertain of matters on the part of the mother will be

compelling as to amount to a positive showing that to deny custody to her would be for the best interests of the child that a Court will be moved to take such child and place it in the custody of some other person. Nye v. Nye, 411 Ill. 408.

The rule being as above stated, the record must be searched to determine whether it contains evidence of the mother's unfitness which compells the Court to reach the conclusion that she is an unfit person to care for such child.

Upon examination of the record in this case, we find there is some evidence that the mother did go to movies, races, the State Fair, and other places of amusement in the company of other men, and that upon occasions she used profane language in the presence of the child. There is an absence of evidence indicating that the petitioner at any time neglected the child. On the other hand, there is ample evidence indicating that petitioner at all times gave the child excellent care.

It is the contention of the defendant that the decision of the trial court is against the weight of the evidence, and that it shows the mother to be unfit to have her child's custody. His argument proceeds upon the theory that because the petitioner is and has been employed, and therefore must be absent from the child during working hours, and because she has associated with other men, these facts in themselves disqualify her as a fit person to have the custody of the child in question.

We know of no standard of conduct to which mothers and fathers must conform in their relationship with their child. What is best for the child must be determined from all the evidence and circumstances pertaining to the particular situation involved in a given proceeding. We shall not detail the evidence in this case. The learned trial judge, in deciding this case, reviewed all of the testimony and other evidence produced upon the hearing and gave what appears to be sound and logical reasons amply supported by the record for the conclusion he reached. He was in a far more

advantageous position than is this court to evaluate the testimony of the several witnesses and to judge the circumstances shown to exist. Reviewing courts have many times expressed their conviction that a trial court in weighing evidence has many advantages denied to the court which merely passes upon the written record. Calvert v. Carpenter, 96 Ill. 63. After a careful reading and examination of the evidence in this record, we are not disposed to disagree with the trial court's findings.

The defendant cites the case of Nye v. Nye, supra, as supporting his proposition that the mother in this case is unfit to have the custody of her child. An examination of this case would seem to indicate that it tends to refute the argument contended for by the defendant. In the Nye case, the Supreme Court, in speaking of the rule applicable to cases involving the custody of children of tender years, said among other things that: "The guiding star is and must be at all times the best interest of the child." This is an elementary rule which has been followed without deviation in every case of which this court is aware.

In cases involving the custody of the child, there is a natural tendency on the part of the contestants to subordinate the welfare of the hapless victims of parental warfare to their own selfish objectives. The future of the child, its comfort, training, health, education, and most important of all, its happiness, are entirely forgotten. Therefore, the courts in resolving these child custody disputes must look beyond the determination of the litigants to reach what is sometimes merely selfish ends and decide what in the future will be for the best interests of the child.

In the case at bar, we are convinced that the trial judge properly decided the issue before him, and that it is for the best interests of the child to award her custody to the petitioner.

advantageous position than is this court to evaluate the testimony of the several witnesses and to judge the circumstances upon appeal. Reviewing courts have many times expressed their conviction that a trial court in weighing evidence has many advantages denied to the court which merely moves upon the written record. Carroll v. Carpenter, 96 Ill. 63. After a careful reading and examination of the evidence in this record, we are not disposed to disagree with the trial court's findings.

The intervenor cites the case of Nye v. Nye, supra, as supporting his proposition that the court in this case is unfit to care for custody of her child. The examination of this case would seem to indicate that it could be relied upon as authority for the intervenor. In the Nye case, the supreme court, in speaking of the rule applicable to cases involving the custody of children of tender years, said among other things that: "The guiding star in such cases is all times the best interest of the child." This is an elementary rule which has been followed without deviation in every case of which this court is aware.

In cases involving the custody of the child, there is a natural tendency on the part of the contestants to subordinate the welfare of the minors to the of personal wishes to their own selfish objectives. The future of the child, its comfort, training, education, and most important of all, its conscience, are entirely forgotten. Therefore, the courts in resolving these cases must wisely look beyond the determination of the litigants to ascertain what is somewhat merely selfish, made and devoid that: in the future will be for the best interests of the child.

In the case at bar, we are convinced that the trial judge properly invoked the jurisdiction of the child, and that it is for the best interests of the child to award her custody to the petitioner.

The judgment of the Circuit Court of Moultrie County is affirmed.

Affirmed.

A

3513

bstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

MAY TERM, A. D. 1953.

General No. 9856 | Agenda No. 5.

350 I.A. 326

ALBERTA GORENS, as Administratrix of the Estate of Marshall L. Gorens, deceased,
Plaintiff-Appellant,

Vs.

WILLIAM BONAPARTE,
Defendant-Appellee.

Appeal from the Circuit Court of Logan County.

REYNOLDS, J.

This is an appeal from the Circuit Court of Logan County. The suit grew out of a collision on U. S. Route No. 66 on September 5, 1948, in which Marshall L. Gorens, a guest passenger in the automobile of the defendant, William Bonaparte, was killed. The defendant ran into the rear of another automobile proceeding in the same direction as that of the defendant's automobile and in the same lane. Alberta Gorens, as Administratrix of the estate of Marshall L. Gorens brought suit against William Bonaparte, charging wilful and wanton acts on the part of the defendant. The cause was tried before a jury and the verdict of the jury was "Not Guilty". From that verdict and judgment thereon, the plaintiff appeals to this court.

The plaintiff assigns as error the giving of two instructions for the defendant and refusing to give three instructions offered by the plaintiff. The first error assigned is the giving of defendant's instruction No. 12. That instruction was in the following language: "The court instructs the jury that to constitute a wanton act, the party doing the act, or failing to act, must be conscious of his conduct and though having no intent to injure must be conscious from his knowledge of the surrounding circumstances and conditions that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits conscious indifference

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

MAY TERM, A. D. 1953.

General No. 9855 | Agenda No. 1.

ALBERTA DORNER, as Administratrix of the Estate of Marshall L. Dorner, deceased,
Plaintiff-Appellant,

vs.

WILLIAM BOMBARDIER,
Defendant-Appellee.

Appeal from the Circuit Court of Logan County.

3 50 I.A. 326

REFERENCE, J.

This is an appeal from the Circuit Court of Logan County.

The suit grew out of a collision on U. S. Route No. 30 on September 5, 1949, in which Marshall L. Dorner, a guest passenger in the automobile of the defendant, William Bombardier, was killed. The defendant ran into the rear of another automobile proceeding in the same direction as that of the defendant's automobile and in the same lane. Alberta Dorner, as Administratrix of the estate of Marshall L. Dorner brought suit against William Bombardier, charging willful and wanton acts on the part of the defendant. The cause was tried before a jury and the verdict of the jury was "Not Guilty". From that verdict and judgment thereon, the plaintiff appeals to this court.

The plaintiff assigns as error the giving of two instructions for the defendant and refusing to give three instructions offered by the plaintiff. The first error assigned is the giving of defendant's instruction No. 12. That instruction was in the following language: "The court instructs the jury that to constitute a wanton act, the party doing the act, or failing to act, must be conscious of his conduct and though having no intent to injure must be conscious from his knowledge of the surrounding circumstances and conditions that his conduct will naturally and probably result in injury. An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, may be exhibits conscious indifference

to consequences, makes a case of constructive or legal wilfulness." The plaintiff complains of the use of the word "conscious" in the instruction, on the ground that the word implants in the minds of the jury the conclusion that if the evidence shows that the defendant was under the influence of intoxicating liquor to the extent that his faculties were impaired or benumbed, the plaintiff could not recover. We cannot agree with that contention. This instruction or in substantially the same words, has been held good in a number of cases. In Bernier v. Illinois Central Railroad Co., 296 Ill. 464 at page 470 the court there said: "Ill-will is not a necessary element of a wanton act. To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. (20 R.C.L. 21.) It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness or wantonness." The language of the Bernier v. Illinois Central Railroad Co. case has been cited with approval in a number of other cases. Countryman v. Sullivan, 344 Ill. App. 371-377; Jeneary v. Chicago and Interurban Traction Co., 306 Ill. 392; Bartolucci v. Falleti, 382 Ill. 168. We cannot agree with the contention of the plaintiff that the jury was in any way misled by this instruction and must hold that in the light of the cases cited, it was a proper instruction.

The plaintiff complains of the giving of defendant's instruction No. 15. This instruction deals only with the question of damages. While it may be true that the language used is awkward, yet we do not believe that the jury was misled by the use of the words: "next

to consequence, makes a case of constructive or legal wilfulness."

The plaintiff complains of the use of the word "conscious" in the instruction, on the ground that the word indicate in the minds of the jury the conclusion that if the evidence shows that the defendant was under the influence of intoxicating liquor to the extent that his faculties were impaired or benumbed, the plaintiff could not recover. We cannot agree with that contention. This instruction or in substantially the same words, has been held good in a number of cases. In Lawler v. Illinois Central Railroad Co., 260 Ill. 464 at page 470 the court there said: "Ill-will is not a necessary element of a wanton act. To constitute a wanton act the party doing the act or failing to act must be conscious of the results, and though having no intent to injure, must be conscious, from the knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. (20 R.C.L. 21.) It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of wantonness the law considers equivalent to a wilful or wanton act. Whether or not a wilful or wanton is directly dependent upon the particular circumstances of each case. Where the evidence to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of wilfulness or wantonness." The language of the Lawler v. Illinois Central Railroad Co. case has been cited with approval in a number of other cases. Chamberlain v. Williams, 344 Ill. app. 371-377; Lemery v. Chicago and Interurban Traction Co., 306 Ill. 352; Bartolucci v. Pulleti, 282 Ill. 168. We cannot agree with the contention of the plaintiff that the jury was in any way misled by this instruction and must hold that in the light of the cases cited, it was a proper instruction.

The plaintiff complains of the giving of defendant's instruction No. 15. This instruction deals only with the question of damages. While it may be true that the language used is unusual, yet we do not believe that the jury was misled by the use of the words: "next

of kin". We are of the opinion that in the minds of the ordinary juror, a widow is considered as next of kin. However, there is another point to be considered in the consideration of this matter. The jury found the defendant not guilty, so that even if erroneous, it would have no effect on the jury because there was nothing set forth in the instruction that would be considered by the jury. As was said in the case of King v. Illinois Midland Coal Co., 158 Ill. App. 351 at page 356: "It is insisted also that the court erred in giving instruction No. 5 on behalf of ~~the~~ defendant. This instruction related to the question of damages and the jury, having found for the defendant, it is self-evident the jury never arrived at the point where it became necessary to consider the question of damages and that although this instruction is inaccurate, it is not such an instruction, considering the finding of the jury for the defendant, that would require a reversal." This matter was also considered in McCutcheon v. City of Chicago, 150 Ill. App. 232 at page 236 and the court there said: "As to the contention that the first instruction upon the measure of damages given at the request of the defendant is erroneous, it may be conceded for the purposes of this case that the instruction does not state the law correctly. But the instruction relates solely to the question of damages, should the jury find the defendant guilty. The jury returned a verdict for the defendant, and hence did not have occasion to consider the question of damages. The instruction, therefore, could not have prejudiced the appellant, and any error therein is not ground for reversal. Cox v. City of Chicago, 83 Ill. App. 540, ~~at page~~ 543; Woffard & Rathbone v. Buchel Power & I. CO. 80 S. W. 1078; Catton v. Dexter, 70 Ill. App. 587." In this case, with the jury finding for the defendant, the instruction could not be considered to be reversible error.

In the brief of the plaintiff, error is assigned for the refusal to give plaintiff's refused instructions, Nos. 1, 2 and 3. For the purpose of this opinion, we shall consider all three of the refused instructions together. The trial court gave four instructions for the plaintiff that fully cover the points set out in the three refused

of kin". We are of the opinion that in the minds of the ordinary juror, a widow is considered as next of kin. However, there is another point to be considered in the consideration of this matter. The jury found the defendant not guilty, so that even if erroneous, it would have no effect on the jury because there was nothing set forth in the instructions that would be considered by the jury. As was said in the case of Ahne v. Illinois Bituminous Coal Co., 158 Ill. App. 351 at page 356: "It is insisted also that the court erred in giving instruction No. 5 on behalf of the defendant. This instruction related to the question of damages and the jury, having found for the defendant, it is self-evident the jury never arrived at the point where it became necessary to consider the question of damages and that although this instruction is inaccurate, it is not such an inaccuracy, considering the finding of the jury for the defendant, that would require a reversal." This matter was also considered in Goldsmith v. City of Chicago, 151 Ill. App. 436 at page 436 and the court there said: "As to the contention that the first instruction upon the measure of damages given at the request of the defendant is erroneous, it can be conceded for the purposes of this case that the instruction does not state the law correctly. But the instruction relates solely to the question of damages, should the jury find the defendant guilty. The jury returned a verdict for the defendant, and hence did not have occasion to consider the question of damages. The instruction, therefore, could not have prejudiced the appellant, and any error therein is not ground for reversal. Cox v. City of Chicago, 83 Ill. App. 370, affirmed 184 Ill. 487; Holland v. Davis v. Burnal Power & L. Co. 90 N. E. 1078; Aetna v. Dexter, 70 Ill. App. 587." In this case, with the jury finding for the defendant, the instructions could not be considered to be reversible error.

In the brief of the plaintiff, error is assigned for the refusal to give plaintiff's refused instructions, Nos. 1, 2 and 3. For the purpose of this opinion, we shall consider all three of the refused instructions together. The trial court gave four instructions for the plaintiff that fully cover the points set out in the three refused

instructions. At best, the refused instructions were repetitious and covered nothing that had not been covered by the given instructions for the plaintiff. There is a further objection to plaintiff's refused instruction No. 1. It refers the jury to the complaint. While the cases in Illinois are not too definite on this point, we think the law well stated in Krieger v. Aurora E. & C. R. Co. 242 Ill. 544, where the court said: "The rule adopted by nearly all courts is, that the court must define the issues to the jury without referring them to the pleadings to ascertain what they are."

For the reasons stated, we hold that the instructions given, fully and accurately stated the law and that the jury was fully instructed as to the issues and the trial court is therefore affirmed.

Affirmed.

~~Publish abstract only.~~

instructions. At most, the refused instructions were repetitious and covered matters that had not been covered by the given instructions for the plaintiff. There is a further objection to plaintiff's refused instruction No. 1. It refers the jury to the complaint. While the cases in Illinois are not too definite on this point, we think the law well stated in Wagner v. Hughes, 4 N. E. 2d. 242 Ill. 294, where the court said: "The rule accepted by nearly all courts is, that the court must define the issues to the jury without referring them to the pleadings to ascertain what they are."

For the reasons stated, we hold that the instructions given, fully and correctly stated the law and that the jury was fully instructed as to the issues and the trial court is therefore affirmed.

Affirmed.

~~Partial concurrent only.~~

A

3533

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

MAY TERM, A. D. 1953.

General No. 9876 | Agenda No. 11.

350 I.A. 327

ROBERT P. VAIL, WALKER H. MILLS and THOMAS H. ARMSTRONG, partners practicing law under the firm name of Vail, Mills and Armstrong,

Plaintiffs-Appellees,

vs.

THE CITY OF PARIS, Edgar County, Illinois, a Municipal Corporation,

Defendant-Appellant.

Appeal from the Circuit Court of Edgar County.

REYNOLDS, J.

The plaintiffs, a law firm of Decatur, Illinois, in April, 1940, were employed as special counsel by the defendant, City of Paris, Illinois, to do certain designated legal work in connection with the construction, financing and operation of a municipal utility then proposed to be constructed and operated by the defendant city. A written contract was entered into between the plaintiffs and the defendant whereby the plaintiffs were to do the major part of the legal work from its beginning to completion and to represent the city in any litigation that might arise. Plaintiffs were to receive three (3) per cent of the costs of the project for their service payable out of the proceeds of the sale of public utilities certificates to be issued.

In 1940 the cost of the proposed plant was estimated to be $820,000.00. Ordinances for the utility were passed by the council and these ordinances were litigated and finally in September, 1942, all the legal obstructions to the proceeding had been concluded. At that time, because the nation was at war, there was a scarcity of materials and labor and the City was unable to secure priorities for certain materials and could not go ahead with the project.

STATE OF ILLINOIS
APPELLATE COURT
SECOND DISTRICT.

MAY TERM, A. D. 1953.

General No. 9976 | Agenda No. 11.

ROBERT P. VAIL, WALKER H. VAIL and THOMAS A. ARMSTRONG, partners practicing law under the firm name of Vail, Vail and Armstrong, Plaintiffs-Appellees, vs. THE CITY OF PARIS, Edgar County, Illinois, a municipal Corporation, Defendant-Appellant.	Appeal from the Circuit Court of Edgar County.

REYNOLDS, J.

The plaintiffs, a law firm of Decatur, Illinois, in April, 1940, were employed as special counsel by the defendant, City of Paris, Illinois, to do certain designated legal work in connection with the construction, financing and operation of a municipal utility then proposed to be constructed and operated by the defendant city. A written contract was entered into between the plaintiffs and the defendant whereby the plaintiffs were to do the major part of the legal work from its beginning to completion and to represent the city in any litigation that might arise. Plaintiffs were to receive three (3) per cent of the costs of the project for their service payable out of the proceeds of the sale of public utilities certificates to be issued.

In 1940 the cost of the proposed plant was estimated to be $320,000.00. Ordinances for the utility were passed by the council and these ordinances were litigated and finally in September, 1942, all the legal obstructions to the proceeding had been concluded. At that time, because the nation was at war, there was a scarcity of materials and labor and the City was unable to secure priorities for certain materials and could not go ahead with the project.

In 1945 the war was concluded and it was estimated by the engineers for the City that the project could be built for the initial estimate of $820,000.00. However, because the bonds issued originally were to mature December 1, 1945, and it was felt that the dates of the bonds should be changed so that a better price could be had in the sale of the bonds, an amendatory ordinance was submitted to the people of the City of Paris in December, 1945 and was defeated. In 1947 a new council for the City of Paris was elected, four of the commissioners being new and a new mayor who had been a former commissioner. At this time, namely in 1947, the engineers had made a new estimate of the proposed utility and had estimated that it would cost $1,400,000.00 instead of the $820,000.00 originally estimated. A number of conferences between the plaintiffs and the new members of the council were held. These conferences were inconclusive in that no action was taken in any way. Apparently, the city council took the position that it would like to go ahead with the project as originally planned and at the original cost. At a conference held in September, 1947, the mayor and one of the commissioners stated that they were in favor of this position. One commissioner stated he was opposed to the project. The other two commissioners thought that the defeat of the amendatory ordinance in the election in 1945 had killed the project. Nothing was done however, by the City and in May, 1948, in another conference with the city officials, the plaintiffs presented their bill for services rendered, based on a quantum meruit. Nothing was done by the City for a year toward proceeding with the project or payment of the plaintiffs' bill and in May, 1949, plaintiffs filed their suit for $18,000.00. The matter was tried before a jury in the Circuit Court of Edgar County, which returned a verdict finding the defendant not guilty. Plaintiffs filed a motion for judgment notwithstanding the verdict and for new trial both of which were overruled. Judgment was entered on the verdict and the plaintiffs appealed from those rulings. The matter was decided by this court in November, 1951, in the case

In 1945 the war was concluded and it was estimated by the engineers for the City that the project could be built for the initial estimate of $820,000.00. However, because the bonds issued originally were to mature December 1, 1945, and it was felt that the dates of the bonds should be changed so that a better price could be had in the sale of the bonds, an amendatory ordinance was submitted to the people of the City of Paris in December, 1945 and was defeated. In 1947 a new council for the City of Paris was elected, four of the commissioners being new and a new mayor who had been a former commissioner. At this time, namely in 1947, the engineers had made a new estimate of the proposed facility and had estimated that it would cost $1,400,000.00 instead of the $820,000.00 originally estimated. A number of conferences between the plaintiffs and the new members of the council were held. These conferences were inconclusive in that no action was taken in any way. Apparently, the city council took the position that it would like to go ahead with the project as originally planned and at the original cost. At a conference held in September, 1947, the mayor and one of the commissioners stated that they were in favor of this position. One commissioner stated he was opposed to the project. The other two commissioners thought that the defeat of the amendatory ordinance in the election in 1945 had killed the project. Nothing was done however, by the City and in May, 1948, in another conference with the city officials, the plaintiffs presented their bill for services rendered, based on a quantum meruit. Nothing was done by the City for a year toward proceeding with the project or payment of the plaintiffs' bill and in May, 1949, plaintiffs filed their suit for $18,000.00. The matter was tried before a jury in the circuit court of Edgar County, which returned a verdict finding the defendant not guilty. Plaintiffs filed a motion for judgment notwithstanding the verdict and for new trial both of which were overruled. Judgment was entered on the verdict and the plaintiffs appealed from those rulings. The matter was decided by this court in November, 1951, in the case

of Vail, Mills and Armstrong v. City of Paris, 344 Ill. App. 590. This court in that case reversed the lower court and remanded the cause for a new trial to be held before the court without a jury. This cause was then tried by the Judge of the Circuit Court without a jury. By stipulation of counsel, the cause was submitted to the court on the record and briefs submitted in the Appellate Court except that the parties stipulated that they might be permitted to introduce evidence as to the value of the services. Hearing was held on the value of services and the cause was taken under advisement by the Circuit Court. Briefs were submitted by both parties. The trial judge in his decision found for the plaintiffs in the amount of $17,500.00 as fair and reasonable fee for the plaintiffs based on the services rendered. From that opinion the defendant city has appealed to this court.

As grounds for appeal the defendant assigns nine errors. In order to pass on these grounds, it will be necessary to refer to the decision of this court in Vail, Mills & Armstrong v. City of Paris, 344 Ill. App. 590. That case, which was tried in 1951, passed upon and decided most of the points of the defendant, raised as error. Taking these assigned errors up by number, they will be passed upon by number.

1. This assigns as error that the court erred in denying the motion of the defendant to dismiss the complaint. We can see no error in the trial court's ruling on this matter. Our decision in the previous case, Vail, Mills & Armstrong v. City of Paris, supra, recognized that the complaint was sufficient. The pleadings in that case were, by stipulation, made the pleadings in this case.

2. The defendant assigns as error the striking of paragraphs 4, 7, 8, 15, 23, 24, 27, 28 and 30 and parts of paragraphs 10, 11, 25 and 29 of defendant's answer. These paragraphs and parts of paragraphs all refer to matters that the court, as a matter of law held were not properly a defense in this case. If the plaintiffs could recover on quantum meruit and we so held in our decision in Vail, Mills & Armstrong v. City of Paris, 344 Ill. App. 590, then these

of Vail, Hills and Armstrong v. City of Paris, 34 Ill. App. 590. This court in that case reversed the lower court and remanded the cause for a new trial to be held before the court without a jury. This cause was then tried by the judge of the Circuit Court without a jury. By stipulation of counsel, the cause was submitted on the court on the record and briefs submitted in the Appellate Court except that the parties stipulated that they might be permitted to introduce evidence as to the value of the services. Hearing was held on the value of services and the cause was taken under advisement by the Circuit Court. Briefs were submitted by both parties. The trial judge in his decision found for the plaintiffs in the amount of $17,500.00 as fair and reasonable fee for the plaintiffs based on the services rendered. From that opinion the defendant city has appealed to this court.

As grounds for appeal the defendant assigns nine errors. In order to pass on these grounds, it will be necessary to refer to the decision of this court in Vail, Hills & Armstrong v. City of Paris, 34 Ill. App. 590. That case, which was tried in 1891, passed upon and decided most of the points of the defendant, raised as error. Taking these assigned errors up by number, they will be passed upon by number.

1. This assigns as error that the court erred in denying the motion of the defendant to dismiss the complaint. We can see no error in the trial court's ruling on this matter. Our decision in the previous case, Vail, Hills & Armstrong v. City of Paris, supra, recognized that the complaint was sufficient. The pleadings in that case were, by stipulation, made the pleadings in this case.

2. The defendant assigns as error the striking of paragraphs 4, 7, 8, 12, 13, 16, 17, 18 and 30 and parts of paragraphs 10, 11, 25 and 29 of defendant's answer. These paragraphs and parts of paragraphs all refer to matters that the court, as a matter of law held were not properly a defense in this case. If the plaintiffs could recover on quantum meruit and we so held in our decision in Vail, Hills & Armstrong v. City of Paris, 34 Ill. App. 590, then these

paragraphs and parts of paragraphs were not proper, in an answer in this case.

3 and 4. These errors are subject to the same reasoning and law we have stated as to No. 2. They have no part in a case based upon quantum meruit.

5. This assigns as error the denying of the motion of the defendant to file an additional answer. If this had been allowed it would allow oral testimony to vary or defeat the terms of a written contract, which is not permitted under the law of Illinois. We can perceive no error in refusing to permit the defendant to file this additional answer.

8. This assigns as error that the judgment is based upon the assumed abandonment of the project by the city. Here again, in the previous case, Vail, Mills & Armstrong v. City of Paris, 344 Ill. App. 590, we said: "We do not believe it can be denied that the defendant has abandoned the project. Certainly, after ten years have elapsed and the City is still making no effort to prodeed with the project, it must be deemed to be abandoned."

9. This assigns as error that the defendant is entitled to have the cause submitted to a jury. Again, this has been decided to the contrary. Vail, Mills & Armstrong v. City of Paris, 344 Ill. App. 590.

This leaves only, of the assigned errors, Numbers 6 and 7. These relate to the entering of judgment, and the amount. The cause was tried before a court, sitting as a jury and the same ruling and law that would apply to a judgment by a jury on questions of fact would apply here.

It has long been the law in this State that a reviewing court will not disturb findings of fact of a trial court, unless the finding is clearly and palpably erroneous. Western & Southern Life Insurance Co. v. Brueggeman, 323 Ill. App. 173. Where the evidence is conflicting the conclusions of the trial judge who saw and heard the

paragraphs and parts of paragraphs were not proper, is an answer in this case.

4 and 5. These errors are subject to the same reasoning and have effect as to do. 4. They have no part in a case tried upon certain merits.

3. This assigns as error the sustaining of the motion of the defendants to file an additional answer. If this has been allowed it would allow oral testimony to vary or defeat the terms of a written contract, which is not permitted under the law of Illinois. We can perceive no error in refusing to permit the defendant to file an additional answer.

6. This assigns as error that the judgment is based upon the assumed abandonment of the project by the city. Here again, in the previous case, Vail, Mills & Brandrup v. City of Davis, 34 Ill. App. 390, we said: "We do not believe it can be denied that the defendant has abandoned the project. Certainly, after ten years have elapsed, the city is still making no effort to produce the project, it must be deemed to be abandoned."

9. This assigns as error that the defendant is entitled to have the cause submitted to a jury. Again, this has been decided to the contrary. Vail, Mills & Brandrup v. City of Davis, 34 Ill. App. 390.

This leaves only of the assigned errors, numbers 8 and 7. These relate to the entering of judgment, and the amount. The cause was tried before a court, sitting as a jury and the same rulings as law that would apply to a judgment by a jury on questions of fact would apply here.

It has long been the law in this State that a reviewing court will not disturb findings of fact of a trial court, unless the finding is clearly and palpably erroneous. Eastern & Western Life Insurance Co. v. Hungerford, 321 Ill. App. 173; "Here the evidence is conflicting the conclusions of the trial judge who saw and heard the

witnesses and had advantages not possessed by this court in judging the weight of their testimony, the verdict should not be disturbed unless clearly wrong. City of Quincy v. Kemper, 304 Ill. ~~App~~. 303; Bellm v. Henry, 336 Ill. App. 525. The chancellor's finding on conflicting evidence and not contrary to the weight of evidence must be sustained on appeal. Sullivan v. Morey, 326 Ill. App. 553. The findings of the trial court, not clearly against the weight of the evidence will not be disturbed. Krutz v. Bour, 167 Ill. 536; People v. Coudy, 296 Ill. 263. Findings of a court trying a case without a jury may not be set aside unless they are clearly and manifestly against the weight of the evidence. Lurie v. Newhall, 333 Ill. App. 173. Where trial court's findings based on oral testimony were not manifestly wrong, the Appellate Court could not substitute its findings for those of the trial court. Hubele v. Baldwin, 332 Ill. App. 330.

This court is not disposed to disturb the ~~verdict~~ finding of the trial judge, since the evidence is conflicting and his decision is a decision of facts.

Therefore, it is the conclusion of this Court after a careful reading of the decision of this Court based on the same facts, namely the case of Vail, Mills & Armstrong v. City of Paris, 344 Ill. App. 590, that the only disputed question before the trial court was the question of whether or not the plaintiffs were entitled to judgment and if so, how much. All the other points were decided by the prior case. The judgment will therefore be affirmed.

Affirmed.

witnesses and had advantages not possessed by this court in judging the weight of their testimony, the verdict should not be disturbed unless clearly wrong. City of Murphy v. Lemmon, 324 Ill. App. 293; Dalia v. Henry, 324 Ill. App. 529. The commissioner's finding on conflicting evidence and not contrary to the weight of evidence must be sustained on appeal. Sullivan v. Morey, 324 Ill. App. 593. The findings of the trial court, not clearly against the weight of the evidence will not be disturbed. Kirks v. Kirk, 327 Ill. 534; Moonie v. County, 296 Ill. 263. Finding of a court trying a case without a jury may not be set aside unless they are clearly and manifestly against the weight of the evidence. Burke v. Kendall, 321 Ill. App. 173. Where trial court's findings based on oral testimony were not manifestly wrong, the Appellate Court could not substitute its findings for those of the trial court. Mabie v. Baldwin, 332 Ill. App. 330.

This court is not disposed to disturb the ~~verdict~~ FINDING of the trial judge, since the evidence is conflicting and his decision is a decision of facts.

Therefore, it is the consideration of this Court after a careful reading of the decision of this Court based on the same facts, namely the case of Hall, Hills & Associates v. City of Harvey, 344 Ill. App. 590, that the only disputed question before the trial court was the question of whether or not the plaintiffs were entitled to judgment and if so, how much. All the other points were decided by the prior case. The judgment will therefore be affirmed.

Affirmed.

Abstract

A 3543

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May ~~February~~ Term, A. D. 1953.

General No. 9891 | Agenda No. 20.

IN THE MATTER OF THE CONSERVATORSHIP OF DOYLE FARLIN.

# # #

ELIZABETH M. FARLIN,
Petitioner-Appellee,

vs.

DOYLE FARLIN,
Respondent-Appellant.

Appeal from
Circuit Court
of McLean County.

350 I.A. 328

REYNOLDS, J.

This is an appeal from the order and judgment of the Circuit Court of McLean County, affirming on appeal, without a trial de novo, the order and judgment of the Probate Court of said County. Elizabeth M. Farlin, the wife of Doyle Farlin, filed her petition in the County Court of McLean County, alleging that her husband, Doyle Farlin, a resident of the City of Bloomington, in said County, was, or was supposed to be for more than two years last past, an incompetent person, who, by reason of such disability was and has been incapable of managing and caring for his estate; that said incompetent has been a missing person for many months; that said disability and disappearance might cause the loss of his choses in action and his said estate was liable to be spent, wasted and lessened and entirely lost by reason of incapable management, whereby Doyle Farlin, as well as his two minor children might become destitute. The petition further states that George Bruce Farlin, the father of Doyle Farlin, departed this life testate, on June 10th, 1951, leaving a last will and testament, whereby one Mabelle Farlin, the stepmother of Doyle Farlin, was named sole legatee and devisee; that the said George Bruce Farlin, deceased, due to extreme ill health, advanced age, senility, hallucinations, coma, blindness and unsound mind and memory was incapable of making his last will and testament; that said will

STATE OF MICHIGAN
APPELLATE COURT
SIXTH DISTRICT

Lansing, Ingham, A. D. 1951.

Docket No. 9821 — Appeal No. 20.

IN THE MATTER OF THE CONSERVATORSHIP OF DOYLE FARLIN.

* * *

GEORGE A. FARLIN,
Petitioner-Appellee,

vs.

DOYLE FARLIN,
Respondent-Appellant.

Appeal from Circuit Court of Jackson County.

OPINION, J.

This is an appeal from the order and judgment of the Circuit Court of Jackson County, affirming on appeal, without a trial de novo, the order and judgment of the Probate Court of said County. Plaintiff, George A. Farlin, the wife of Doyle Farlin, filed her petition in the County Court of Jackson County, alleging that her husband, Doyle Farlin, a resident of the City of Ypsilanti, in said County, was, or was supposed to be for more than two years last past, an incompetent person, who, by reason of such disability was and has been incapable of managing and caring for his estate; that said incompetent has been a missing person for many months; that said disability and disappearance might cause the loss of his choses in action and his said estate was liable to be spent, wasted and lessened and entirely lost by reason of improvable mismanagement, wherein Doyle Farlin, as well as his two minor children might become destitute. The petition further states that George Bruce Farlin, the father of Doyle Farlin, departed this life testate, on June 10th, 1921, leaving a last will and testament, whereby one Nabelle Farlin, the stepmother of Doyle Farlin, was named sole legatee and devisee; that the said Doyle Farlin, deceased, due to extreme ill health, advanced age, senility, hallucinations, coma, blindness and unusual lax and memory was incapable of making his last will and testament; that said will

was void as to Doyle Farlin; that if said will was declared void and set aside, the said Doyle Farlin would be seized of an undivided two-thirds of all property of George Bruce Farlin, deceased, amounting to about $60,000.00. The petition then asked for the appointment of one E. Hudson Foreman, a qualified and experienced agrarian, as conservator. Summons for Doyle Farlin issued on March 19th, 1952, was returned on March 24th, 1952, by the sheriff of McLean County, "not found in my county." This return was filed on June 2nd, 1952. On March 27th, 1952, affidavit for publication was filed. On April 4th, 11th and 18th, 1952, publication notice was published in the LeRoy Journal. The publication notice did not state the name of the petitioner or plaintiff, or the number of the case. On May 27th, 1952, under limited appearance, Doyle Farlin filed his objection to the jurisdiction of the Probate Court of McLean County and moved to strike the affidavit for publication, the notice of publication and the return thereof and that the certificate of publication be quashed and the proceedings dismissed for want of jurisdiction. This objection and motion was denied. There was no further participation by the defendant Doyle Farlin after denial of his motion to strike. On June 9th, 1952, an appeal bond was fixed by the Probate Court and on June 10th, 1952, the defendant Doyle Farlin, filed his bond for appeal to the Circuit Court and the bond was approved by the Probate Court. On June 11th, 1952, the Probate Court entered an order finding Doyle Farlin incompetent and found that he was a resident of McLean County and denied the limited motion to strike. In the Circuit Court, counsel for Doyle Farlin appeared under limited appearance especially for the purpose of the hearing on the motion to strike. Hearing was had and the Circuit Court held that the defendant had waived question of jurisdiction by his motion and filing of an appeal bond and that the filing of motion for appeal and the filing of the appeal bond was a general appearance without limitation. On September 25th, 1952, the order and judgment of the Circuit Court was that it had jurisdiction of the parties and subject matter; that the only question

was void as to Doyle Parlin; that if said will was declared void and set aside, the said Doyle Parlin would be seized of an undivided two-thirds of all property of George Bruce Parlin, deceased, amounting to about $60,000.00. The petition then asked for the appointment of one E. Hudson Freeman, a qualified and experienced appraiser, as conservator. Summons for Doyle Parlin issued on March 10th, 1952, was returned on March 24th, 1952, by the sheriff of Nolan County, "not found in my county." This return was filed on June 2nd, 1952. On March 27th, 1952, affidavit for publication was filed. On April 9th, 11th and 16th, 1952, publication notice was published in the Daily Journal. The publication notice did not state the name of the petitioner or plaintiff, or the number of the case. On May 27th, 1952, under limited appearance, Doyle Parlin filed his objection to the jurisdiction of the Probate Court of Nolan County and moved to strike the affidavit for publication, the notice of publication and the return thereof and that the certificate of publication be quashed and the proceedings dismissed for want of jurisdiction. This objection and motion was denied. There was no trial particularly by the defendant Doyle Parlin after denial of his motion to strike. On June 9th, 1952, an appeal bond was fixed by the Probate Court and on June 10th, 1952, the defendant Doyle Parlin, filed his bond for appeal to the Circuit Court and the bond was approved by the Probate Court. On June 11th, 1952, the Probate Court entered an order finding Doyle Parlin incompetent and found that he was a resident of Nolan County and denied the limited motion to strike. In the Circuit Court, counsel for Doyle Parlin appeared under limited appearance especially for the purpose of the hearing on the motion to strike. Hearing was had and the Circuit Court held that the defendant had waived question of jurisdiction by his motion and filing of an appeal bond and that the filing of motion for appeal and the filing of the appeal bond was a general appearance without limitation. On September 25th, 1952, the order and judgment of the Circuit Court was that it had jurisdiction of the parties and subject matter; that the only question

for determination was as to the jurisdiction of the court; that Doyle Farlin had submitted his person to the jurisdiction of the Probate Court and by perfecting an appeal, also submitted his person to the jurisdiction of the Circuit Court; that the order entered in Probate cause No. 26106 in the Probate Court of McLean County should be affirmed and that the same was affirmed in all respects.

The order of the Circuit Court held that the defendant, by filing his motion for appeal bond had entered his general appearance, not only in the Probate Court but in the Circuit Court as well.

Section 487 of the Probate Act, Illinois Revised Statutes (1951) provides that "Upon an appeal to the circuit court the cause shall be tried de novo." The words de novo have been defined as meaning "fresh" or "anew". That a de novo trial in an Appellate Court is a trial had as if no action whatever had been instituted in the court below. It means "a second time." Words and Phrases, Vol 12, page 70. In Schwartfager vs. Schwartfager, 330 Ill. App. 111 at page 113, that court said: "It has been repeatedly held both by the Supreme and Appellate Courts of this State, that in appeals from the Probate Court to the Circuit Court, the hearing is a trial de novo, and the appeal acts to set aside any order that might have been rendered in the Probate Court. The Circuit Court does not sit as a court of errors, but should try the case the same as though it had never been tried before, which on further appeal to the Appellate or Supreme Court, the judgment should be reviewed as that of the Circuit Court and the view of the Probate Court is of no importance in passing on that judgment. Barnes v. Earle, 275 Ill. 381; In re Estate of Murray v. Appeal of Murray, 310 Ill. App. 121; In re Estate of Schwartz, 286 Ill. App. 310, and In re Estate of Noel v. Noel, 228 Ill. App. 569."

We are of the opinion that when the defendant perfected his appeal from the judgment of the Probate Court to the Circuit Court, it vacated the judgment of the Probate Court and that the subsequent affirmance of the Probate Court by the Circuit Court, was the affirmance of a nullity, as the judgment of the Probate Court had been

for determination was as to the jurisdiction of the court; that Doyle Family had submitted his person to the jurisdiction of the Probate Court and by prosecuting an appeal, also submitted his person to the jurisdiction of the Circuit Court; that the order entered in probate cause No. 20106 in the Probate Court of McLean County should be affirmed and that the same was affirmed in all respects.

The order of the Circuit Court held that the defendant, by filing his notice for appeal had entered his general appearance, not only in the Probate Court but in the Circuit Court as well.

Section 87 of the Probate Act, Illinois Revised Statutes (1951) provides that "Upon an appeal to the circuit court the cause shall be tried de novo." The words de novo have been defined to mean "fresh" or "anew". That a de novo trial in an appellate court is a trial had as if no action whatever had been instituted in the court below. It means "a second time." Words and Phrases, Vol 14, page 70. In Lowenthal vs. Chicago, 320 Ill. App. 111 at page 115, that court said: "It has been repeatedly held both by the Supreme and appellate courts of this State, that in appeals from the Probate Court to the Circuit Court, the hearing is a trial de novo, and the appellate acts as if no order had ever been rendered in the Probate Court. The Circuit Court does not sit as a court of errors, but should try the case the same as though it had never been tried before, which on further appeal to the Appellate or Supreme Court, the judgment should be reviewed as that of the Circuit Court and the view of the Probate Court is of no importance in passing on that judgment. Barnes v. Barle, 275 Ill. 381; In re Estate of Murral v. Appeal of Murray, 310 Ill. App. 121; In re Estate of Schwerdt, 326 Ill. App. 310 and In re Estate of Noel v. Noel, 326 Ill. App. 566."

We are of the opinion that when the defendant perfected his appeal from the judgment of the Probate Court to the Circuit Court, it vacated the judgment of the Probate Court and that the subsequent affirmance of the Probate Court by the Circuit Court, was an affirmance of a nullity, as the judgment of the Probate court had been

vacated. It was the duty of the Circuit Court to pass upon the case upon its merits. It should have tried the case de novo and was without jurisdiction either to affirm or reverse the judgment of the Probate Court.

We refrain from expressing any opinion as to the merits of the motion to dismiss on the grounds of lack of jurisdiction, or on any other points raised in the briefs but feel certain that on a retrial, the court and counsel will have the benefit of the research made necessary by this appeal.

The judgment confirming the appeal is reversed and the cause remanded to said court to proceed and try the case de novo .

Reversed and remanded.

vacated. It was the duty of the Circuit Court to pass upon the case upon its merits. It should have tried the case de novo and was without jurisdiction either to affirm or reverse the judgment of the Probate Court.

We refrain from expressing any opinion as to the merits of the motion to dismiss on the grounds of lack of jurisdiction, or on any other points raised in the briefs but feel certain that on a retrial, the court and counsel will have the benefit of the research made necessary by this appeal.

The judgment conflicting the appeal is reversed and the cause remanded to said court to proceed and try the case de novo.

Reversed and remanded.

OK
Bert Anderson

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Abstract

General No. 10642 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

350 I.A. 498

- - -

SECOND DISTRICT

- - -

February Term, A.D. 1953

JEAN DUFFY, a minor, by James Duffy, her father and next friend, and JEAN DUFFY, Administrator of the estate of BERTHA BROCKWAY, Deceased, Plaintiffs-Appellants, vs. RAYMOND CORTESI, Defendant-Appellee.	Appeal from the Circuit Court of Lake County, Illinois.

Dove, P. J.

The plaintiff, Jean Duffy, administrator of the estate of Bertha Brockway, deceased, is the daughter of the said Bertha Brockway. The plaintiff, Jean Duffy, a minor, is the granddaughter of the said Bertha Brockway and a daughter of Jean Duffy, the administrator of the estate of the said Bertha Brockway. The instant complaint sought to recover damages from the defendant, Raymond Cortesi, for injuries sustained by Jean Duffy, a minor, and to recover damages for the wrongful death of Bertha Brockway. The cause was tried by a jury, which returned verdicts finding the the defendant not guilty as to both counts of the complaint. After overruling motions for a new trial and for judgments notwithstanding the verdicts, the trial court rendered judgments on the verdicts against the plaintiffs in bar of the actions,

IN THE

APPELLATE COURT OF ILLINOIS

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SECOND DISTRICT

- - -

February Term, A.D. 1951

JEAN DUFFY, a minor, by James Duffy, her father and next friend, and JEAN DUFFY, Administrator of the estate of MARTHA BROCKWAY, Deceased,	Appeal from the
Plaintiffs-Appellants,	Circuit Court of
vs.	Lake County, Illinois.
RAYMOND CORTESI,	
Defendant-Appellee.	

Dove, J. U.

The plaintiff, Jean Duffy, administrator of the estate of Martha Brockway, deceased, is the daughter of the said Martha Brockway. The plaintiff, Jean Duffy, a minor, is the granddaughter of the said Martha Brockway and a daughter of Jean Duffy, the administrator of the estate of the said Martha Brockway. The instant complaint sought to recover damages from the defendant, Raymond Cortesi, for injuries sustained by Jean Duffy, a minor, and to recover damages for the wrongful death of Martha Brockway. The cause was tried by a jury, which returned verdicts finding the the defendant not guilty as to both counts of the complaint. After overruling motions for a new trial and for judgments notwithstanding the verdicts, the trial court rendered judgments on the verdicts against the plaintiffs in bar of the actions.

and to reverse those judgments the plaintiffs appeal.

The first count of the complaint was filed on behalf of Jean Duffy, the minor, by her father and next friend. In it she alleged that she was injured when struck by the automobile of defendant on the 23rd day of June, 1949, as a result of the negligence and carelessness of the defendant in the operation of his automobile as she was crossing Central Avenue in the City of Highland Park, Lake County, from north to south on the west crosswalk of Second Street in said city. By the second count, Jean Duffy, as the administrator of the estate of Bertha Brockway, deceased, alleged that the decedent, Bertha Brockway, was killed when she was negligently and carelessly run into by the automobile of the defendant as she was crossing Central Avenue from north to south on the west crosswalk of Second Street in the City of Highland Park in Lake County. By his answer, the defendant denied the charges of negligence and carelessness made against him in both counts, and denied that plaintiff and decedent were crossing Central Avenue on the west cross-walk as alleged. It is insisted by counsel for appellants that the verdicts of the jury are contrary to the manifest weight of the evidence and that the trial court erred in the giving of a certain instruction on behalf of the defendant.

The accident in question occurred about 6:40 o'clock on the evening of June 23, 1949. It happened ~~at~~ near the intersection of Central Avenue and Second Street, which intersection is in the heart of the business section of Highland Park. Central Avenue is a paved street running east and west and is about sixty feet wide. Second Street is also a paved street, and it runs in a north and south direction and is about forty feet wide.

and to reverse those judgments the plaintiffs appeal.

The first count of the complaint was filed on behalf of Jean Duffy, the minor, by her father and next friend. In it she alleged that she was injured when struck by the automobile of defendant on the 23rd day of June, 1949, as a result of the negligence and carelessness of the defendant in the operation of his automobile as she was crossing Central Avenue in the City of Highland Park, Lake County, from north to south on the west crosswalk of Second Street in said city. By the second count, Jean Duffy, as the administrator of the estate of Martha Broadway, deceased, alleged that the decedent, Martha Broadway, was killed when she was negligently and carelessly run into by the automobile of the defendant as she was crossing Central Avenue from north to south on the west crosswalk of Second Street in the City of Highland Park in Lake County. By his answer, the defendant denied the charges of negligence and carelessness made against him in both counts, and denied that plaintiff and decedent were crossing Central Avenue on the west cross-walk as alleged. It is argued by counsel for appellants that the verdicts of the jury are contrary to the manifest weight of the evidence and that the trial court erred in the giving of a certain instruction on behalf of the defendant.

The accident in question occurred about 9:40 o'clock on the evening of June 23, 1949. It happened at the intersection of Central Avenue and Second Street, which intersection is in the heart of the business section of Highland Park. Central Avenue is a paved street running east and west and is about sixty feet wide. Second Street is also a paved street, and it runs in a north and south direction and is about forty feet wide.

There were electrically operated stop signs at the southeast and northwest corners of the intersection. Jean Duffy was five years old at the time of the accident and was with her grandmother, Bertha Brockway. They were crossing Central Avenue from north to south on the west side of Second Street and, when struck by appellee's automobile, they had reached a point in Central Avenue about twenty-two feet south of the north curb of this avenue. The evidence clearly shows that when they were struck by the automobile they were not in the crosswalk but, just how far west of the crosswalk they were, the evidence is conflicting.

Earl Lempinen was a witness on behalf of the plaintiff. He testified that he was the Captain of Police of Highland Park and had been since 1939; that on June 23, 1949, he investigated the accident here in question; that when he arrived at the scene, which he estimated was some twenty minutes after the accident, he looked the scene over quite closely and found a blood stain on the street about thirty-two feet west of the west line of the crosswalk and also found several particles of glass, which were picked up by him and others and fitted into the glasses belonging to Bertha Brockway, the deceased; that these particles of glass were seven feet from the west line of the crosswalk and twenty feet from the north curb line of Central Avenue; that he found tire skid marks approximately six feet in length just east of the ~~blook~~ blood spot; that there is a center line down Central Avenue dividing it into east and west bound lanes of traffic and that the skid marks which he observed were about five feet over on the north side of the centerline; that when he arrived at the scene there were no parked cars on Central Avenue within ~~with reference~~

There were electrically operated stop signs at the southeast and northwest corners of the intersection. Jean Duffy was five years old at the time of the accident and was with her grandmother, Bertha Proskway. They were crossing Central Avenue from north to south on the west side of Second Street and, when struck by a policeman's automobile, they had reached a point in Central Avenue about twenty-two feet south of the north curb of this avenue. The evidence clearly shows that when they were struck by the automobile they were not in the crosswalk but, just how far west of the crosswalk they were, the evidence is conflicting.

Earl Lapham was a witness on behalf of the plaintiff. He testified that he was the Captain of Police of Highland Park and had been since 1922; that on June 23, 1919, he investigated the accident here in question; that when he arrived at the scene, which he estimated was some twenty minutes after the accident, he looked the scene over quite closely and found a blood stain on the street about thirty-two feet west of the west line of the crosswalk and also found several particles of glass, which were picked up by him and others and fitted into the glasses belonging to Bertha Proskway, the deceased; that these particles of glass were seven feet from the west line of the crosswalk and twenty feet from the north curb line of Central Avenue; that he found tire skid marks approximately six feet in length just east of the [illegible] spot; that there is a center line down Central Avenue dividing it into east and west bound lanes of traffic and that the skid marks which he observed were about five feet over on the north side of the centerline; that when he arrived at the scene there were no parked cars on Central Avenue within xxxxxxxxxxxxxxx

twenty-five feet from the crosswalk leading from the northwest corner to the southwest corner of Central Avenue and Second Street; that the ambulance which took the decedent to the hospital had left just before he got there; that automobiles park on Central Avenue diagonally to the curb; that there were a number of business stores on the north side of Central Avenue at the point where the accident occurred and that these stores were open at the time of the accident and that defendant told him that he did not see the pedestrians until he had struck them.

Jean Duffy testified that Bertha Brockway, the decedent, was her mother and that the minor plaintiff, Jean Duffy, was her daughter and was five years old at the time of the accident; that her mother, Bertha Brockway, was a retired school teacher, seventy years of age, and in good health at the time of the accident; that her mother and her daughter, at the time of the accident, were on their way to a pharmacy which was located in the middle of the block west of the intersection where the accident occurred and on the south side of the street.

The defendant, called by the plaintiffs as an adverse witness, testified that he was employed as a body and fender man by the Cadillac Automobile Company and had been for five years and was so employed on June 23, 1949; that on that evening he was driving his automobile, a 1939 Nash, north on Second Street, and that his objective was to turn west into Central Avenue at its intersection with Second Street; that Central Avenue is a stop street; that he was alone at the time of the accident and was on his way to a grocery market located on Central Avenue to pick up his brother-in-law; that he stopped at the intersection,

twenty-five feet from the crosswalk leading from the north-west corner to the southwest corner of Central Avenue and Second Street; that the ambulance which took the decedent to the hospital had left just before he got there; that Antonia Park on Central Avenue diagonally to the curb; that there were a number of business stores on the north side of Central Avenue at the point where the accident occurred and that these stores were open at the time of the accident and that witnesses told him that he did not see the pedestrians until he had struck them.

Jane Duffy testified that Martha Fromway, the decedent, was her mother and that the minor plaintiff, Jane Duffy, was her daughter and was five years old at the time of the accident; that her mother, Martha Fromway, was a retired school teacher, seventy years of age, and in good health at the time of the accident; that her mother and her daughter, at the time of the accident, were on their way to a pharmacy which was located in the middle of the block west of the intersection where the accident occurred and on the south side of the street.

The defendant, called by the plaintiffs as an adverse witness, testified that he was employed as a boy and father man by the Vanilla Automobile Company and had been for five years and was so employed on June 23, 1944; that on that evening he was driving the automobile, a 1937 Buick, north on Second Street, and that his objective was to turn west into Central Avenue at the intersection with Second Street; that Central Avenue is a five street; that he was alone at the time of the accident and was on his way to a grocery market located on Central Avenue to pick up his brother-in-law; that he stopped at the intersection

and when he did so, he noticed a car directly across the street from him on the northwest side of the street; that this car which he saw had the right of way, so he stopped to wait for him to come on but that this car didn't move, so he proceeded; that before he turned he looked at his right, which was to the east, and then turned on Central Avenue and had proceeded past the cross-walk, in first gear, traveling eight or ten miles per hour; that he didn't see the decedent or the plaintiff, Jean Duffy; that the sun was setting and it was shining in his eyes, and he couldn't see anything for a minute. Counsel for appellant then asked him: "And when you continued on past the cross-walk, the sun was still in your eyes?" The defendant answered: "That's just when it got in my eyes." The defendant further testified that he was familiar with this intersection as he had lived in Highland Park all of his life; that other than the car across the street, which he was watching, there were other cars around in the vicinity of the intersection; that as he turned west into Central Avenue, part of his wheels were south of the center line of Central Avenue; that at the time he struck the two pedestrians, the right side of his car was about eighteen feet from the north curb line of Central Avenue and three or four feet north of the center line of Central Avenue; that he applied his brakes the moment he heard the thud resulting from hitting the two persons whom he struck; that as he turned into Central Avenue, the sun began to bother him the moment he turned west; that he "cut" the corner a little as he turned into Central Avenue; that when he stopped his car after the accident he was approximately thirty-two feet west of the west cross-walk, and he estimated

and when he did so, he noticed a car directly across the street from him on the northwest side of the street; that this car which he saw had the right of way, so he stopped to wait for him to pass on but that this car didn't move, so he proceeded; that before he turned he looked at his right, which was to the east, and then turned on Central Avenue and had proceeded past the cross-walk, in first gear, travelling eight or ten miles per hour; that he didn't see the defendant or the plaintiff, Mrs. Duffy; that the sun was setting and it was shining in his eyes, and he couldn't see anything for a minute. Counsel for plaintiff then asked him: "And when you continued or past the cross-walk, the sun was still in your eyes?" The defendant answered: "That's just when it got in my eyes." The defendant further testified that he was familiar with this intersection as he had lived in Highland Park all of his life; that other than the car across the street, which he was watching, there were other cars around in the vicinity of the intersection; that as he turned west into Central Avenue, part of his wheels were south of the center line of Central Avenue; that at the time he struck the two pedestrians, the right side of his car was about eighteen feet from the north curb line of Central Avenue and three or four feet north of the center line of Central Avenue; that he applied his brakes the moment he heard the shot resulting from hitting the two persons when he struck; that as he turned into Central Avenue, his car began to bounce and the moment he turned west; that he "cut" the corner a little as he turned into Central Avenue; that when he stopped his car after the accident he was approximately thirty-two feet west of the east cross-walk, and he estimated

that he stopped within ten feet after the impact of his car with the decedent and Jean Duffy.

Mike Bonamarte testified on behalf of the plaintiffs that he was a police officer in Highland Park and had been employed in that capacity for a number of years and that he investigated this accident; that when he arrived at the scene, there was a woman lying in the street west of the intersection of Second Street and Central Avenue; that the ambulance got there about the same time he did and that he assisted in placing the decedent in the ambulance; that the woman was lying about thirty feet west of the cross-walk on Central Avenue and twenty feet south of the north curb on Central Avenue and about seven feet from the center line of the avenue; that there were no cars parked along the street between the cross-walk and where the woman was lying on the street, and that he observed about fifty or sixty people all along the sidewalk.

The foregoing is substantially all the evidence introduced on behalf of the plaintiffs. On behalf of the defendant, Robert A. Kane was the only witness. He testified that at the time of the accident he had been living in Highwood for two and one-half years and that he was foreman of the Bowman Dairy Co. in Highland Park; that at approximately 6:45 o'clock on the evening of the accident, he had just come out of a barber shop located on Second Street and had backed his car out into Second Street and was facing south; that he was on the left-hand side of Second Street and had stopped and was getting ready to make a left-hand turn into Central Avenue in order to go east on Central Avenue; that he saw the automobile driven by the defendant just

that he stopped within ten feet after the impact of his car with the pedestrian and then left.

The testimony tendered on behalf of the plaintiffs that he was a police officer in Highland Park and had been employed in that capacity for a number of years and that he investigated this accident; that when he arrived at the scene, there was a woman lying in the street west of the intersection of Second Street and Central Avenue; that the ambulance got there about the same time he did and that he assisted in placing the decedent in the ambulance; that the woman was lying about thirty feet west of the cross-walk on Central Avenue and twenty feet south of the north curb on Central Avenue and about seven feet from the center line of the street; that John went on one period along the street between the cross-walk and where the woman was lying on the street, and then he observed about fifty or sixty people all along the sidewalk.

The foregoing is substantially all the evidence introduced on behalf of the plaintiffs. On behalf of the defendant, Robert C. Shaw was the only witness. He testified that at the time of the accident he had been living in Highwood for two and one-half years and that he was foreman of the Towman Dairy Co. in Highland Park; that at approximately six o'clock on the evening of the accident, he had just come out of a barber shop located on Second Street and had backed his car out into Second Street and was facing south; that he was on the left-hand side of Second Street and had stopped and was getting ready to make a left-hand turn into Central Avenue in order to go east on Central Avenue; that he saw the automobile driven by the defendant just

on the other side of Central Avenue at the intersection; that he had stopped and observed defendant's car was facing north; that he had never seen the defendant before; that there was a car alongside of his car in Second Street and to his right; that he noticed the defendant's car come into the intersection rather slow and make a left-hand turn and that defendant was looking to his right, which was to the east; that he watched him rather carefully because he was going so slowly; that after the defendant crossed the cross-walk, he heard an impact; that all of defendant's car was just over the west line of the cross-walk when he heard the impact; that as the car of the defendant turned into the intersection, he could see the defendant behind the wheel; that his view of the impact was blocked by a car parked diagonally at the north curb on Central Avenue; just how far this car was parked from the cross-walk he did not know, but he did know that it was west of the crosswalk and that this parked car prevented the witness from seeing the impact of the defendant's car with the two pedestrians; that he backed his car back into the parking place which he had just left and went over to the scene of the accident and that this diagonally parked car, which had obstructed his view, was still there; that while he was at the scene of the accident, someone kicked the decedent's glasses to the east; just who it was who kicked the glasses and how far they were kicked, he could not say; that when he saw the defendant's car turning west into the intersection, the defendant was looking to the east over his shoulder; that this fact was what drew his attention to the defendant, and that he, the witness, also looked to the east; that he saw the defendant's face at the time he heard the impact, but he was unable to say for certain

on the other side of Central Avenue at the intersection; that he had stopped and observed defendant's car was traveling south; that he had never seen the defendant before; that there was a car alongside of his car in second street and to the right; that he noticed the defendant's car come into the intersection rather slow and veer to left-hand turn and that defendant was looking to the right, which was to the west; that he watched the car carefully because he was going so slowly; that after the defendant crossed the crosswalk, he heard an impact; that all of defendant's car was just over the west line of the crosswalk when on hearing the impact; that as the car of the defendant crossed into the intersection, he could see the defendant turning the wheel; that his view of the impact was blocked by a car parked diagonally at the north curb of Central Avenue; just how fast this car was traveling from the northwest in fifty-one blows, but he did know that it was west of the crosswalk and that this parked car prevented the witness from seeing the impact of the defendant's car with the two pedestrians; that he heard his car back into the parking place which is the last left hand turn west over to the scene of the accident and that this diagonally parked car, which had obstructed his view, was still there; that while he was at the scene of the accident, someone moved the defendant's car to the east; that was it was who moved the cars and how far they were moved, he could not say; that when he saw the defendant's car turning west into the intersection, the defendant was looking to the east over his shoulder; that this fact was what drew his attention to the defendant, and just as, the witness also looked to the east; that he saw the defendant's face at the time he heard the impact, but he was unable to say, or to tell

whether he was facing west or east at that time. Upon cross-examination he admitted that at the coroner's inquest he did not testify to anything concerning cars parked on the north side of Central Avenue and west of the intersection at the time of the accident.

Whether there was an automobile parked diagonally at the north curb of Central Avenue, as testified to by Mr. Kane, and whether the plaintiff, Jean Duffy, and Mrs. Brockway came from behind any automobile parked close to the northwest corner of the intersection and were crossing Central Avenue diagonally west of the cross-walk, as argued by counsel for appellee, or whether appellee proceeded, blinded by the sun, and negligently ran his car into the minor plaintiff and her grandmother were questions of fact for the determination of the jury. No one saw Mrs. Brockway or Jean Duffy struck by defendant's car or knows the exact point in the street where they were hit. As said in Koll v. Mitchell, 330 Ill. App. 132, cited and relied upon by appellee, the probative value of evidence and the inferences and conclusions to be drawn therefrom lie within the province of the jury. As also said in Jones v. Esenberg, 299 Ill. App. 551, courts of review are reluctant to substitute their judgment for that of a jury, and while they have the power and it is their duty to do so when convinced that the verdict is palpably against the weight of the evidence, yet such fact must appear before the finding of the jury will be distrubed. In our opinion the evidence was sufficient to warrant the verdict which the jury arrived at, and we are not disposed to hold that the verdict is manifestly against the weight of the evidence.

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Whether there was an automobile parked diagonally at the north curb of Central Avenue, as testified to by Mr. Kane, and whether the plaintiff, Jean Duffy, and Mrs. Brockway came from behind any automobile parked close to the northwest corner of the intersection and were crossing Central Avenue diagonally west of the cross-walk, as argued by counsel for appellee, or whether appellee proceeded, blinded by the sun, and negligently ran his car into the minor plaintiff and her grandmother were questions of fact for the determination of the jury. No one saw Mrs. Brockway or Jean Duffy struck by defendant's car or knows the exact point in the street where they were hit. As said in Koll v. Mitchell, 330 Ill. App. 132, cited and relied upon by appellee, the probative value of evidence and the inferences and conclusions to be drawn therefrom lie within the province of the jury. As also said in Jones v. Esenberg, 299 Ill. App. 631, courts of review are reluctant to substitute their judgment for that of a jury, and while they have the power and it is their duty to do so when convinced that the verdict is palpably against the weight of the evidence, yet such fact must appear before the finding of the jury will be disturbed. In our opinion the evidence was sufficient to warrant the verdict which the jury arrived at, and we are not disposed to hold that the verdict is manifestly against the weight of the evidence.

The plaintiff, Jean Duffy, contends that the court erred in giving on behalf of the defendant the following instruction: "If you find from the evidence and under the instructions of the court that the injuries, if any, suffered by the plaintiff, Jean Duffy, a minor, were caused proximately and solely by a person other than the defendant, then the plaintiff, Jean Duffy, a minor, cannot recover from the defendant." It is true, as counsel for appellant insists, instructions must be based upon the issues raised by the pleadings and the evidence and that the only person who could have inflicted any injury upon Jean Duffy, as shown by the evidence found in this record, was the automobile driven by the defendant, and for that reason the instruction should have been refused. We are not inclined, however, to believe that the jury could have been misled by this instruction, and we do not believe it was reversible error to give it.

Finding no reversible error in this record, the judgments of the Circuit Court of Lake County will be affirmed.

Judgments affirmed.

The plaintiff, Jean Duffy, contends that the court erred in giving on behalf of the defendant the following instruction: "If you find from the evidence and under the instructions of the court that the injuries, if any, suffered by the plaintiff, Jean Duffy, a minor, were caused proximately and solely by a person other than the defendant, then the plaintiff, Jean Duffy, a minor, cannot recover from the defendant." It is true, as counsel for appellant insists, instructions must be based upon the issues raised by the pleadings and the evidence and that the only person who could have inflicted any injury upon Jean Duffy, as shown by the evidence found in this record, was the automobile driven by the defendant, and for that reason the instruction should have been refused. We are not inclined, however, to believe that the jury could have been misled by this instruction, and we do not believe it was reversible error to give it.

Finding no reversible error in this record, the judgments of the Circuit Court of Lake County will be affirmed.

Judgments affirmed.

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45952

STANFORD PETROLEUM CORPORATION, a corporation, Appellee, v. RODI BOAT COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

350 I.A. 498

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in equity against the Rodi Boat Company, a corporation, and others. Summons and writ of injunction were served on the defendant. Defendant filed a special appearance challenging the jurisdiction of the court, and for no other purpose whatever, and an affidavit. The affidavit states in substance that the defendant is a Florida corporation; that it does not do business in this state and that it had no officers, agents or employees in this state, nor had it at any time sent any officer, agent or employee into this state. Defendant also filed a plea to the jurisdiction of the court, averring that the summons was never served on the defendant, a corporation, in the State of Florida. The trial court sustained defendant's motion to dismiss for lack of jurisdiction.

Subsequently defendant filed a written suggestion of damages under the provisions of the Injunction Act, Chapter 69, Section 12, Illinois Revised Statutes, State Bar. Asso. Edition 1951, to recover as damages attorney's fees resulting from the alleged wrongful issuance of the injunction. Defendant appeals from the order denying the assessment of damages.

Defendant's sole contention is that the court erred in denying the attorney's fees asked in the suggestion of damages.

So far as the record shows, the injunction was not dissolved nor did the defendant make any motion for its dissolution.

The rule is that a defendant may recover as damages, on dissolution of an injunction, the solicitor's fees which he has paid or become obligated to pay for services rendered in obtaining the dissolution of the injunction but not for those rendered in the general defense of the suit. Lambert v. Alcorn, 144 Ill. 313. The damages allowed by statute are only those sustained by reason of an improper or wrongful suing out of an injunction and the solicitor's fees can only extend to the motion to dissolve. Leonard v. Pearce, 271 Ill. App. 428. The instant suit was dismissed as to this defendant on jurisdictional grounds alone, and in the absence of any proof of legal services rendered in a direct attack on the injunction there can be no recovery of damages under the provisions of the Injunction Act.

For the reasons stated, the order appealed from is affirmed.

ORDER APPEALED FROM AFFIRMED.

FEINBERG AND KILEY, JJ., CONCUR.

45989

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207

BYCIE ANN LINDSAY, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
ARTHUR PARIS LINDSAY and CHICAGO TERMINAL NATIONAL BANK, a national Banking Association, Appellees.	)	COOK COUNTY.

350 I.A. 499

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing her complaint for separate maintenance for want of equity. The complaint alleges in substance that the parties consummated a common law marriage in Minnesota where they lived and cohabited together as husband and wife from 1921 to 1925 when defendant induced plaintiff to come to the City of Chicago, County of Cook and State of Illinois, where they continued to live together until March 1945; that eight children were born of the marriage, all of which died except two who have since attained maturity; that in the month of March 1945 the defendant willfully deserted and absented himself from the plaintiff; and that in August 1945 defendant went through a marriage ceremony with one Jane Doe and thereafter cohabited with her as her husband without first having obtained a divorce from the plaintiff.

The defendant answered denying the alleged common law marriage and averred that plaintiff was married to one Joseph Garrett at the time defendant first met plaintiff, and that said marriage has never been dissolved.

In her reply plaintiff says that in the year 1921 when she met defendant "she was reliably informed and fully believed that said Joseph Garrett was either dead or had obtained a divorce from plaintiff."

Defendant filed a cross complaint which alleged that plaintiff of her own volition deserted her husband Joseph Garrett and thereafter the parties entered into a "meretricious relationship"; and that because of the threats and other conduct of plaintiff she has made the life of cross complainant miserable and unbearable. The concluding paragraph of the cross complaint prays for a decree awarding him an injunction or, in the alternative, a decree of divorce in the event the court should find that the parties were lawfully married.

Plaintiff and counterdefendant filed an answer. After the issues were joined the cause was referred to a special commissioner who filed a report on February 18, 1948. The report found among other things that the parties were lawfully married in Minnesota in the winter of 1922 and recommended that the plaintiff be allowed temporary alimony and solicitor's fees, and that the sums due be paid out of the money on deposit credited to the account of defendant in a Chicago bank.

The record shows that on April 12, 1948 leave was granted the defendant by court order to sue out a commission to take the deposition of Joseph Garrett in Columbus, Ohio, and appointing a commissioner. November 4, 1949 an order was entered on plaintiff's motion which provides:

"It is hereby stipulated and agreed by and between the parties hereto that this cause be submitted to the Court for disposition on its merits upon the record testimony and exhibits introduced and admitted on behalf of each party at the hearing before the Special Commissioner, Henry C. Ferguson upon the hearing for temporary alimony and Solicitor's fees and also upon deposition of JOSEPH GARRETT heretofore taken."

August 8, 1952 the decree here appealed from was entered. Paragraph 2 of the findings in the decree reads:

"2. That the Plaintiff BYCIE ANN LINDSAY had a present living husband, one JOSEPH GARRETT, since 1917, and at the time of the deposition taken from him in 1948, and that said marriage was not dissolved so that she could in no wise have contracted a marriage, common law or otherwise, with the Defendant, ARTHUR PARIS LINDSAY or with anyone else in Minneapolis, Minnesota in the year 1921, or at any other time or place while the said marriage with JOSEPH GARRETT was in existence and undissolved;"

The basic issue presented by this record is whether there was a valid and subsisting marriage between plaintiff and Joseph Garrett at the time plaintiff contends a common law marriage was consummated with defendant. The decree recites that the deposition of Garrett was read into the record and made a part of the evidence before the trial court. A careful examination of the record discloses that the deposition of Garrett was omitted. The decree imports verity and in the absence of Garrett's testimony we must assume that his testimony was sufficient to warrant a finding that plaintiff was married to Garrett since 1917 and that this marriage was not dissolved. Under these circumstances plaintiff could not have contracted a common law marriage with defendant. We are therefore impelled to

affirm the decree. In the view which we take of this case it is unnecessary for us to consider other contentions made by plaintiff.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG AND KILEY, JJ., CONCUR.

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45946

DOROTHY JANOVICZ, Administratrix of the Estate of Victor Janovicz, Deceased,	)	APPEAL FROM
Appellee,	)	SUPERIOR COURT,
v.	)	COOK COUNTY.
EDWIN SCHIESHER,	)	
Appellant.	)	

350 I.A. 499

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brings this action under the Wrongful Death statute, alleging negligence on the part of the defendant in operating his automobile on a public highway known as Torrence Avenue in Cook County, causing the death of plaintiff's intestate. A trial with a jury resulted in a verdict for plaintiff for $12,500. Defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial was overruled, judgment was entered upon the verdict, and defendant appeals.

The evidence discloses that Torrence Avenue is a north and south highway in Cook County, approximately eighteen feet wide, having a black top paved surface with a three-foot shoulder on the east side of the road; and that approximately three feet from the edge of the pavement was a guard-rail running parallel with the highway. The accident occurred on February 18, 1948, between 12:30 and 12:45 A.M., on Torrence Avenue, approximately a mile north of highway No. 83. There were no eyewitnesses to the occurrence.

Carlson, a witness for the plaintiff, was the only one who testified as to the movement of defendant's truck

immediately prior to the accident. He testified that he was driving his trailer truck west on Route 83 and turned north on Torrence Avenue; that the weather was foggy, and the pavement was damp and slick; that the condition of traffic going north was light; that defendant was driving a Ford truck; that shortly after turning off of Route 83 the Ford truck, going north, passed him, traveling about 40 miles an hour; that in passing him the Ford truck had to turn into the southbound traffic lane, divided from the northbound lane by a white line; that he could see his stop lights and then saw them flash like "when a man was putting his brakes on," and then saw him pull off to the side of the road and come to a stop; that he pulled up right behind the Ford; that he saw a man's checkered hunting cap at the center line of the road; and that at the place where the Ford truck stopped, its two right wheels were on the shoulder of the road and the two left wheels on the pavement.

He further testified that the driver of the Ford came up to him and said, "I hit something but I don't know what it is." He got a flashlight out of his truck, and they both walked back and found the man's cap in the middle of the road. They then walked back another 10 or 20 feet and found the body. The body was about 200 feet south of the place where the Ford stopped. It was lying directly under the guardrail with the upper half of the body lying towards the pavement. The cap was on the center line of the road, which divides the north and south lanes of traffic. The

injured man was unconscious but still groaning and breathing. An ambulance was called, and he was taken from the scene of the accident. The right front fender headlight of the Ford was pushed out and back against the rear, and the window glass on the right side was broken out. At the time of the accident, visibility was poor, due to the heavy fog and the wet black pavement, which was just "starting to turn slick." He noticed glass from the headlight on the edge of the pavement and some glass on the shoulder.

On cross-examination he testified that after the Ford passed him on the left, it assumed its path on the east half of Torrence Avenue; that "the driver was driving as normal persons do"; that he was in his own lane of traffic, and was not over to the center and was not on the shoulder; that from the time he turned into Torrence Avenue from Route 83 he saw two or three vehicles going south and none of them crossed over to the wrong side of the street; that the speed limit for trucks in that section of the highway is 45 miles per hour, and there is no speed limit for pleasure cars on Torrence; that there were no speed limit signs posted; and that when the Ford passed him both of the headlights were burning, but when he came to a stop there was only one headlight burning.

There was no evidence of any skid marks on the pavement at or near the place of the accident. The foregoing is the only evidence in the record from which any inferences of negligence on the part of the defendant could be drawn.

The location of the body after the accident could well give rise to a reasonable inference that deceased was walking to the left of the paved portion of the highway, in compliance with the Motor Vehicle Act (Ill. Rev. Stat. 1951, Chap. 95-1/2, §175) which reads:

> "It is the duty of any person walking along and upon improved highways to keep on the left of the paved portion, or on the left shoulder thereof, and upon meeting a vehicle when walking on the said paved portion to step off to the left."

The court gave at the request of defendant an instruction quoting the statute referred to. The obvious purpose of the quoted statute is to require pedestrians on such a highway, while walking, to keep to the left of the paved portion, facing approaching traffic. The further reasonable inference could well be drawn by the jury that the deceased, found on the east shoulder of the highway, was walking in a southerly direction, facing the traffic, as alleged in plaintiff's complaint. This inference is supported by proof in the record of the careful habits of the deceased, reflecting upon his exercise of due care at the time of the accident.

Defendant argues there is no evidence of negligence on the part of the defendant. We think the jury could reasonably infer that defendant was guilty of negligence in the operation of his truck, in driving it at a speed of 40 miles per hour when visibility was so poor that he either could not see the deceased, though his headlights were burning, and admitted he did not know what he struck when he felt the impact, or else he could see but was not keeping a proper lookout to observe the deceased immediately before the accident.

Defendant complains of instruction No. 3, given for plaintiff. It is a lengthy instruction, setting up in the language of the complaint the several charges of negligence relied upon, and directing a verdict for the plaintiff if the jury find defendant guilty of one or more of the particular acts of negligence, as alleged in said complaint, and that such negligence, if any, was the proximate cause of the injuries and death complained of.

This court (Second Division), after many definite warnings in other cases concerning the propriety of this type of instruction, reversed the judgment for plaintiff for the giving of such an instruction in Signa v. Alluri, Docket No. 45818, opinion filed at the present term of court, and cited by defendant.

Defendant is in no position to complain of the giving of this instruction. Upon the trial he offered plaintiff's complaint in evidence, and by agreement the original and amended complaints were received in evidence. Both sides read from the complaint and amended complaint in their argument to the jury, and it was stated to the jury in final argument that they would take the complaint to the jury room in the consideration of the case. No objection was made by the defendant to the suggestion, and while the record is not explicit, the fair inference is that the jury were allowed to take the pleadings to the jury room without objection. Therefore, the instruction did no more than give to the jury what counsel on both sides had already agreed the jury could have.

It is important in a case like this, where there are no eyewitnesses to the accident and proof of negligence rests upon circumstances and inferences, that the jury be properly instructed and not misled or confused by the court's instructions.

Plaintiff's instruction No. 11 reads as follows:

> "The Words, 'proximate cause', whenever used in these instructions, mean that cause which, in natural unbroken and continuous sequence, produced the result complained of. It need not be the sole cause, nor the last or nearest cause; it is sufficient if it concurs with some other cause acting at the same time which, in combination with it, causes the injury."

It is fundamental that instructions must be based upon some evidence. In C., R. I. & P. Ry. Co. v. Rathneau, 225 Ill. 278, 285, the court said:

> "This instruction, as drawn, is a mere abstract proposition of law and might for that reason have been refused without error. The doctrine of this court is that instructions should be based on the evidence before the jury. (Coughlin v. People, 18 Ill. 266; Belk v. People, 125 id. 584; Healy v. People, 163 id. 372.)"

There is no evidence in this record of any concurring cause resulting in the accident. The jury could well be led to believe by this instruction that even if deceased was guilty of contributory negligence, if it concurred with that of the alleged negligence of defendant it would be sufficient to constitute defendant's alleged negligence the proximate cause. This, of course, is contrary to the applicable settled rule of liability.

Considering that the jury had the pleadings before them, containing the repetitious reference to negligence on

the part of the defendant, we are impelled to feel that the giving of instruction No. 11 for plaintiff, which states an abstract proposition of law, the last sentence of which is not founded upon any evidence and not applicable to the issues, so misled and confused the jury as to deprive the defendant of a fair trial.

What was said in Bald v. Nuernberger, 267 Ill. 616, 620, is applicable. It was there stated:

> "This court has frequently held that instructions may supplement each other, but each one must state the law correctly as far as it goes, and they should be in harmony, so that the jury will not be misled. The jury are not able to select from contradictory instructions one which correctly states the law. (Illinois Iron and Metal Co. v. Weber, 196 Ill. 526; Ratner v. Chicago City Railway Co. 233 id. 169; People v. Lee, 248 id. 64; People v. Novick, 265 id. 436.) This instruction stated the law incorrectly, and even though there may have been correct instructions it is impossible to tell which ones the jury followed."

We find no merit in the other points raised by defendant.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LEWE, P.J., AND KILEY, J., CONCUR.

O/K. Wolfe

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Abstract

General No. 10672 Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

350 I.A. 500

May Term, A.D. 1953

DONALD C. ALLENSWORTH, Trustee, Plaintiff-Appellant, vs. LESTER GRIFFITH, Defendant-Appellee.	Appeal from the Circuit Court of Knox County.

Per Curiam:

On April 28, 1952, the plaintiff filed with John C. Kost, a justice of the peace of Knox County, a complaint, alleging that he was entitled to the possession of the front apartment on the first floor of a home located at No. 444 North Academy Street in Galesburg, Illinois, and charging that Lester Griffith unlawfully withholds possession thereof from him and praying for a summons as provided by law. Upon a hearing on May 16, 1952, the plaintiff and defendant being present in court, the justice, at the conclusion of the evidence offered on behalf of the plaintiff, rendered a judgment dismissing the case and in favor of the defendant and against the plaintiff for costs. The transcript of the justice of the peace filed in the office of the clerk of the Circuit Court on May 29, 1952, shows that on that day (May 29, 1952) the "plaintiff asked for an appeal to the Circuit Court of Know County, Illinois, filed

General No. 10272 — Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

May Term, A.D. 1952

DONALD C. ALLEN-CURTIS, Trustee, Plaintiff-Appellant, vs. LESTER DARTITH, Defendant-Appellee.	Appeal from the Circuit Court of Lake County.

Opinion:

On April 20, 1951, the plaintiff filed with John C. Rost, a justice of the peace of Lake County, a complaint, alleging that he was entitled to the possession of the front apartment on the first floor of a home located at 60. 14th North Academy Street in Waukegan, Illinois, and charging that Lester Dartith unlawfully withholds possession thereof from him and praying for a summons as provided by law. Upon a hearing on May 16, 1952, the plaintiff and defendant being present in court, the justice, at the conclusion of the evidence offered on behalf of the plaintiff, rendered a judgment dismissing the case and in favor of the defendant and against the plaintiff for costs. The transcript of the justice of the peace filed in the office of the clerk of the Circuit Court on May 26, 1952, shows that on that day (May 26, 1952) the plaintiff asked for an appeal to the Circuit Court of Lake County, Illinois, filed

an appeal bond and paid $5.00 as circuit clerk's filing fee."

The record discloses that the next step in the case was the filing by the plaintiff of an instrument in the Circuit Court on June 9, 1952, which he designated "Motion for Writ of Restitution" and which concluded: "Plaintiff Trustee, Don C. Allensworth prays for ordered writ of Restitution to take effect July 1, 1952, and for payment of rent for the month of May in the sum of $40.00." This motion recited the provisions of the statute to the effect that if any party to a forcible detainer proceeding felt himself aggrieved by the decision of the justice he may have an appeal provided such party files notice of appeal and bond within five days from the rendition of judgment. This motion then continued: "Plaintiff was denied the right to sign bond within five days but was permitted to sign the bond at the expiration of the ten-day notice by the justice; that the 10 day notice, copy hereto attached, was served and filed with the Rent Stabilization Board as required by the Act and that bond was filed as soon as the Justice would accept the fee. Plaintiff served the 10 day notice on May 19, 1952 after the justice dismissed the case on the 16th which was within the required five days under the statute and tried to make the bond at the same time. Bond was signed on May 29, 1952."

The record then discloses that upon motion of the plaintiff the cause was set for trial for June 24th, 1952, and on that day, June 24th, the following order was entered:

"Don Allensworth, Trustee vs. Lester Griffith.	Appeal from Justice Court. (Forcible Entry and Detainer)

"In open court on this day, to-wit, June 24, 1952 the parties litigant hereto are present in open court and now comes the defendant and enters a motion

an appeal bond and pay $5.00 as circuit clerk's filing fee."

The record discloses that the next step in the case was the filing by the plaintiff of an instrument in the circuit court on June 9, 1952, which he designated "motion for writ of possession" and which concluded: "Plaintiff prayes, Don D. Allensworth prays for ordered writ of possession to take effect July 1, 1952, and for payment of rent for the month of May in the sum of $40.00." This motion recited the provisions of the statute to the effect that if any party to a forcible entry proceeding felt himself aggrieved by the decision of the justice he may have an appeal provided such party files notice of appeal and bond within five days from the rendition of judgment. This motion then continued: "Plaintiff was denied the right to sign bond within five days but was permitted to sign the bond at the expiration of the ten day notice by the justice; that the 10 day notice, copy hereto attached, was served and filed with the Rent Stabilization Board as required by the Act and that bond was filed as soon as the justice would accept the fee. Plaintiff served the 10 day notice on May 12, 1952 after the justice dismissed the case on the 12th which was within the required five days under the statute and tried to make the bond at the same time. Bond was signed on May 23, 1952."

The record then discloses that upon motion of the plaintiff the cause was set for trial for June 24th, 1952, and on that day, June 24th, the following order was entered:

"Don Allensworth, Trustee vs. Leslie Griffith.	) Appeal from Justice Court.) (Forcible entry and detainer))

"In open court on this day, to-wit, June 24, 1952 the parties litigant hereto are present in open court and now comes the defendant and enters a motion

to dismiss the appeal herein for failure of the appellant to perfect the appeal within the time allowed by statute by virtue of failing to file a bond within the five days prescribed; the court, after due consideration thereof, finds the issues for the said defendant and said findings of the court being now the judgment of the court, and by force and virtue thereof:

"It is therefore considered, ordered and adjudged by the court that the said defendant, Lester Griffith, be declared not guilty herein and that he, the said defendant, do now go hence without day as to this proceeding and that the plaintiff, Don Allensworth, Trustee, take nothing by his writ herein and the motion to perfect the appeal is hereby denied by the court with procedendo."

On August 11, 1952, plaintiff filed a motion to vacate the order of June 24, 1952, which motion was, on September 8, 1952, denied. On December 5, 1952, plaintiff filed in the circuit court a notice of appeal, and on February 4, 1952, the transcript of the record was filed in this court, and on February 28, 1953, appellant filed what purports to be an abstract of record and on March 28, 1953, filed his brief and argument. Appellee has not entered any appearance in this court or filed any motions, brief or argument. The Forcible Entry and Detainer Act provides that if any party shall feel aggrieved by the decision of the court, upon any trial had under this Act, such party may have an appeal, to be taken to the same courts, in the same manner, and tried in the same way as appeals are taken and tried in other cases, provided such party files notice of appeal and bond within 5 days from the rendition of judgment. No notice of appeal shall be required in

to dismiss the appeal herein for failure of the appellant to perfect the appeal within the time allowed by statute by virtue of failing to file a bond within the five days prescribed; the court, after due consideration on the motion, finds the issues for the said defendant and said finding of the court being now the judgment of the court, and by force and virtue thereof:

"It is therefore considered, ordered and adjudged by the court that the said defendant, Lester Griffith, be declared not guilty herein and that he, the said defendant, do now go hence without day as to said proceeding and that the plaintiff, Don Allensworth, Trustee, take nothing by his writ herein and the motion to perfect the appeal is hereby denied by the court with prejudice."

On August 11, 1982, plaintiff filed a motion to vacate the order of June 24, 1982, which motion was, on September 8, 1982, denied. On November 3, 1982, plaintiff filed in the circuit court a notice of appeal, and on February 4, 1983, the transcript of the record was filed in this court, and on February 22, 1983, appellant filed what purports to be an abstract of record and on March 23, 1983, filed his brief and argument. Appellee has not entered any appearance in this court or filed any motions, brief or argument. The Forcible Entry and Detainer Act provides that if any party shall feel aggrieved by the decision of the court, upon any trial had under this act, such party may have an appeal, to be taken to the same courts, in the same manner, and tried in the same way as appeals are taken and tried in other cases, provided such party file notice of appeal and bond within 5 days from the rendition of judgment. No notice of appeal shall be required in

9 per letter 8-18-53

cases appealed from justices of the peace but the party appealing must file a bond within 5 days from the rendition of the judgment (Ill. Rev. Stat. 1951, chap. 57, sec. 18).

The instant case originated in the justice court of John C. Kost by the plaintiff filing with the justice his complaint. A hearing in that court was had and a judgment was rendered in favor of the defendant and against the plaintiff on May 16, 1952. Thirteen days thereafter plaintiff filed a bond, executed by himself individually and as trustee, in the sum of $50.00, which the justice approved, and the case was thus removed to the circuit court by the plaintiff. In his motion filed on June 9, 1952, plaintiff set forth the provisions of the statute which required the filing of an appeal bond within five days after the rendition of the judgment in the justice court in order to remove this cause to the circuit court. Appellant sought to excuse his delay apparently by a recital in his motion of June 9, 1952, that he was denied the right to sign a bond within the five-day period but was later permitted to do so. This motion was not verified. There is nothing in the record to substantiate appellants bare assertion that he was denied the right to sign a bond within five days after May 16, 1952, and in this same motion he recited that his appeal bond was signed on May 29, 1952.

Appellant appears in this court in his own behalf and in his brief states that the court erred in denying him "the summary remedy of writ of restitution in this action" and that where "the justice of the peace has wrongfully prevented plaintiff from obtaining his bond and appeal within five days, plaintiff should not be denied relief in the circuit court." Appellant then calls to our attention State Bank of St. Charles v. Burr, 277 Ill. App. 373, and Kruse v. Ballsmith, 332 Ill. App. 301.

cases appealed from justices of the peace but the party appealing must file a bond within 5 days from the rendition of the judgment (Ill. Rev. Stat. 1921, chap. 37, sec. 12).

The instant case originated in the justice court of John E. Kost by the plaintiff filing with the justice his complaint. A hearing in that court was had and a judgment was rendered in favor of the defendant and against the plaintiff on May 16, 1922. Fifteen days thereafter plaintiff filed a bond executed by himself individually and as trustee, in the sum of $50.00, which the justice approved, and the case was thus removed to the circuit court by the plaintiff. In his motion filed on June 9, 1922, plaintiff set forth the provisions of the statute which required the filing of an appeal bond within five days after the rendition of the judgment in the justice court in order to remove this cause to the circuit court. Plaintiff sought to excuse his delay apparently by a recital in his motion of June 9, 1922, that he was denied the right to file a bond within the five-day period but was later permitted to do so. This motion was not verified. There is nothing in the record to substantiate appellants bare assertion that he was denied any right to sign a bond within five days after May 16, 1922, and in this case motion he recited that his appeal bond was signed on May 26, 1922.

Appellant appears in this court in his own behalf and in his brief states that the court erred in denying his "the summary remedy of writ of restitution in this action" and that were "the justice of the peace has wrongfully prevented plaintiff from obtaining his bond and appeal within five days, plaintiff should not be denied relief in the circuit court." Appellant then calls to our attention State Bank of St. Charles v. Burr, 277 Ill. App. 323, and Kruse v. Salisbury, 226 Ill. App. 301.

In the Burr case the plaintiff bank sought to recover possession of certain premises from the defendant and instituted its forcible detainer action before a justice of the peace, resulting in a judgment in favor of the plaintiff. The defendant prosecuted an appeal to the circuit court by filing an appeal bond in the sum of $400.00 with the justice which was accepted and approved by the justice. The circuit court dismissed the appeal and ordered a writ of procedendo to issue on the ground that the transcript from the justice of the peace failed to show that the justice had fixed the amount of the appeal bond at $400.00 and failed to show that a prayer for an appeal had been made as provided by section 18 of the Forcible Entry and Detainer Act. In reversing that judgment, this court said: (p. 376) "It is not in dispute that the appeal bond was filed and approved by the justice within the statutory time or that the filing fee was paid, or that the justice did not transmit the proceedings to the circuit court, and file a transcript. Appellee's position was that because of the fact the transcript as filed failed to show in so many words that an appeal was prayed and the amount at which the appeal bond was fixed, voided the appeal and that as a matter of law 'no appeal was really taken, but only an attempted appeal.' All that is required to perfect an appeal in an action of this kind, from the justice court to the circuit court is to comply with the substantial requirements of the statute. - - - - When the substantial requirements of the statute have been complied with in appeals of this character, the court of appeal should take jurisdiction of the parties and should afford the appealing party the opportunity of perfecting his appeal so as to bring it within the strict compliance of the statute. It is the purpose of courts to see that a trial may be had upon the merits, whenever the same can be done without violence to

In the case the plaintiff had sought to recover possession of certain premises from the defendant and instituted its forcible detainer action before a justice of the peace, resulting in a judgment in favor of the plaintiff. The defendant prosecuted an appeal to the circuit court by filing an appeal bond in the sum of $200.00 with the justice which was accepted and approved by the justice. The circuit court dismissed the appeal and ordered a writ of possession to issue on the ground that the transcript from the justice of the peace failed to show that the justice had filed the bond of the appeal bond at $200.00 and failed to show that a proper for an appeal had been made as provided in section 13 of the forcible entry and detainer act. In reversing that judgment, this court said: (p. 273) "It is not in dispute that the appeal bond was filed and approved by the justice within the statutory time or that the filing fee was paid, or that the justice did not transmit the proceedings to the circuit court, and file a transcript. Appellee's position was that because of the fact the transcript as filed failed to show in so many words that an appeal was prayed and the amount in which the appeal bond was filed, "cited the appeal and took as a matter of law 'an appeal was really taken, but only an attempted appeal.' All that is required to perfect an appeal in an action of this kind, from the justice court to the circuit court is to comply with the substantial requirements of the statute. - - - - When the substantial requirements of the statute have been complied with in regards to this character, the court of appeal should take jurisdiction of the parties and should afford the appealing party the opportunity of perfecting his appeal so as to bring it within the strict compliance of the statute. It is the purpose of courts to see that a trial may be had upon the merits, whenever the same can be done without violence to

existing statutes or rules of practice. Where a person in good faith and within the time limited by the statute undertakes to perfect an appeal in a case of this character, and actually takes the steps required by statute to perfect such appeal, he should not by any reason of omission on the part of the magistrate be deprived of his right to have his cause heard."

In Kruse v. Ballsmith, 332 Ill. App. 301, the plaintiffs filed their complaint for possession of certain premises under the provisions of the Forcible Entry and Detainer Statute in a justice court. A trial before the justice resulted in a judgment for the plaintiffs, and the defendants appealed to the circuit court of Kane County. Pending the appeal, the defendants continued to occupy the premises until two days before the case was heard in the circuit court. At the trial, of which defendants and their counsel had notice, the defendants did not appear and the court proceeded with an ex parte hearing before a jury, resulting in a verdict finding that the defendants wilfully and wrongfully withheld possession of the premises from the plaintiffs and assessing the plaintiffs damages for double the rent accruing after the commencement of the suit. In affirming a judgment rendered on this verdict, this court stated that the judgment in the circuit court was entered on October 1, 1946, and that notice of appeal was not filed until October 30, 1946, and held that the time for filing the notice of appeal under the Forcible Entry and Detainer Act expired five days after October 1, the date of the judgment or, at the latest, five days after October 11th, on which date the court had denied defendants' motion to vacate the judgment entered on October 1st. The court then held that defendants' notice of appeal did not comply with the jurisdictional requirements of the statute.

existing statutes or rules of practice. Where a person in good faith and within the time limited by the statute undertaken to perfect an appeal in a case of this character, and actually takes the steps required by statute to perfect such appeal, he should not by any reason of omission on the part of the registrate be deprived of his right to have his cause heard."

In Grant v. Tallmadge, 270 Ill. App. 501, the plaintiffs filed their complaint for possession of certain premises under the provisions of the Forcible Entry and Detainer Statute in a justice court. A trial before the justice resulted in a judgment for the plaintiffs, and the defendants appealed to the circuit court of Lake County. Pending the appeal, the defendants continued to occupy the premises until two days before the case was heard in the circuit court. At the trial, of which defendants had actual personal due notice, the defendants did not appear and the court proceeded with an ex parte hearing before a jury, resulting in a verdict finding that the defendants wrongfully withheld possession of the premises from the plaintiffs and assessing the plaintiffs damages for double the rent accruing after the commencement of the suit. In affirming a judgment rendered on this verdict, this court stated that the judgment in the circuit court was entered on October 1, 1926, and that notice of appeal was not filed until October 30, 1926, and held that the time for filing the notice of appeal under the Forcible Entry and Detainer Act expired five days after October 1, the date of the judgment or, at the latest, five days after October 11th, on which date the court had denied defendants' motion to vacate the judgment entered on October 1st. The court then held that defendants' notice of appeal did not comply with the jurisdictional requirements of the statute.

There is nothing said in either of these cases favorable to appellant's contention. This proceeding terminated in the justice court on May 16, 1952. In order to perfect an appeal to the Circuit Court from the judgment rendered in the justice court, appellant was required to file his bond within five days thereafter. He did not do so but filed a bond thirteen days thereafter. The trial in the Circuit Court was de novo, and on June 24, 1952, the record shows the parties were present in the Circuit Court and a judgment was rendered that plaintiff take nothing by his complaint. On August 11, 1952, forty-eight days after the Circuit Court had decided the case, appellant filed a motion to vacate that judgment. This motion to vacate was denied on September 8, 1952, and eighty-eight days thereafter appellant filed in the Circuit Court his notice of appeal.

Prasnikar v. Harmeling, 329 Ill. App. 341, was a forcible detainer action originally brought before a justice of the peace where judgment was rendered for the plaintiffs and the defendants appealed to the Circuit Court of Cook County. The Circuit Court rendered a similar judgment in favor of the plaintiffs, and the defendants appealed. In the Appellate Court the plaintiffs moved to dismiss the appeal because of the failure of the defendants to file their notice of appeal and bond within five days from the entry of the judgment. In sustaining this motion, the court cited the statute and the cases of Gentile v. Butler, 278 Ill. App. 371, and Veach v. Hendricks, 278, Ill. App. 376, disagreed with the conclusions arrived at in those cases, and said (pp. 342-3): "The trial in the circuit court on an appeal from the justice of the peace is a trial de novo, is under the Forcible Detainer Act and governed by all its provisions and is identical with the trial in the circuit court of a forcible detainer action initiated in that

There is nothing said in either of these cases

favorably to appellant's contention. This accounting transpired

in the justice court on May 14, 1952. In order to perfect an

appeal to the circuit court from the judgment rendered in the

justice court, appellant was required to file his bond within

five days thereafter. He did not do so but filed a bond fifteen

days thereafter. The trial in the circuit court was de novo, and

on June 24, 1952, the record shows the parties were present in

the circuit court and a judgment was rendered that plaintiff take

nothing by his complaint. On August 13, 1952, forty-five days

after the circuit court had decided the case, appellant filed a

motion to vacate that judgment. This motion to vacate was denied

on September 8, 1952, and eighty-eight days thereafter appellant

filed in the circuit court his notice of appeal.

Prendergast v. Hornsby, 253 Ala. App. 641, was a

forcible detainer action originally brought before a justice of

the peace where judgment was rendered for the plaintiff and the

defendants appealed to the circuit court of Dale County. The

circuit court rendered a similar judgment in favor of the plaintiffs,

and the defendants appealed. In the appellate court the plaintiffs

moved to dismiss the appeal because of the failure of the defendants

to file their notice of appeal and bond within five days from the

entry of the judgment. In sustaining this motion, the court cited

the statute and the cases of Gantlin v. Butler, 258 Ala. 87,

and Ebert v. Mendelson, 258, Ala. App. 74, disagreeing with the

contentions advanced in those cases, and said (pp. 372-4): "The

trial in the circuit court on an appeal from the judgment of the

peace is a trial de novo, is under the forcible detainer act and

governed by all the provisions and is identical with the trial in

the circuit court of a forcible entry and detainer action initiated in that

court. Under the holding in the cases cited by defendants an appeal from a judgment of the circuit court in an action of forcible detainer commenced in that court must be perfected within five days, but an appeal from a judgment of the same court in an action of forcible detainer appealed from a justice of the peace may be taken within the time specified in the Civil Practice Act for appeals; that is, within 90 days from the entry of the judgment as a matter of right, or within one year upon leave of court. This is contrary to the express wording of the statute, which grants an appeal from the judgment of the court 'upon any trial had under this Act' provided it is taken within five days. It also defeats the purpose of the statute, which was to create a summary remedy in which the rights of the parties would be speedily determined on an appeal permitted only if taken within the time specified in the statute. No reason has been suggested for prescribing one time for appeal in cases initiated in the circuit court and another for cases determined in that court on appeal from a justice of the peace."

In an endeavor to have a trial de novo in the circuit court after judgment had been rendered against him in the justice court and in an endeavor to have this court review the judgment of the circuit court entered against him, appellant has failed to follow the plain provisions of the statute, and the only proper order which this court can make is to dismiss this appeal.

Appeal dismissed.

court. Under the ruling in the cases cited by defendants an appeal from a judgment of the circuit court in an action of trespass unlawful commenced in that court must be perfected within five days, but an appeal from a judgment of the same court in an action of forcible detainer appealed from a justice of the peace may be taken within the time established in the Civil Practice Act for appeals; that is, within 30 days from the entry of the judgment or a motion of right, or within one year upon leave of court. This is contrary to the express wording of the statute, which grants an appeal from the judgment of the court 'upon all trial had under this act' provided it is taken within five days. It also defeats the purpose of the statute, which was to create a summary remedy in which the rights of the parties could be speedily determined on an appeal bonded only, if taken within the time specified in the statute. No reason has been suggested for discriminating one law for appeal in cases initiated in the circuit court and another for cases originated in that court and appealed from a justice of the peace."

In an endeavor to have a trial de novo in the circuit court after judgment had been rendered against him in the justice court and in an endeavor to have this court review the judgment of the circuit court entered against him, appellant has failed to follow the plain provisions of the statute, and the only proper order which this court can make is to dismiss this appeal.

Appeal dismissed.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM, A.D. 1953

General No. 9852 Agenda No. 3

People of the State of Illinois ex rel. Nathan C. Bobroff, Petitioner-Appellant, vs. Sam Levin and Edith Levin, Respondents-Appellees.	Appeal from the Circuit Court of McDonough County

Wheat, P. J.

Petitioner, Nathan C. Bobroff, appeals from an order of the Circuit Court of McDonough County, Illinois, denying his petition for writ of habeas corpus to obtain custody of his children, Sherry Lee Bobroff, aged thirteen, and Geoffrey Hunter Bobroff, aged seven, and remanding them to the custody of their maternal grandparents, respondents Sam Levin and Edith Levin.

From a voluminous record of 1160 pages, the following facts appear: Petitioner and Sylvia N. Bobroff, daughter of the respondents, were married June 7, 1937. Shortly thereafter petitioner gave up his automobile business and, with his wife, lived in the home of respondent Sam Levin, and assisted him in his business until the latter part of 1937. Petitioner and his wife thereafter moved to East Moline where, from 1938 to December 26, 1941, he engaged simultaneously in

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

MAY TERM A.D.1953

General No. 9892 Agenda No. 3

People of the State of Illinois ex rel. Nathan C. Dobroff, Petitioner-Appellant, vs. Sam Levin and Edit Levin, Respondents-Appellees.	Appeal from the Circuit Court of McDonough County

Mr. J. J.

Petitioner, Nathan C. Dobroff, appeals from an order of the Circuit Court of McDonough County, Illinois, denying his petition for writ of habeas corpus to obtain custody of his children, Gerry, Ted Dobroff, aged thirteen, and Geoffrey Lester Dobroff, aged seven, and remanding them to the custody of their maternal grandparents, respondents Sam Levin and Edith Levin.

From a voluminous record of 1100 pages, the following facts appear: Petitioner and Sylvia V. Dobroff, daughter of the respondents, were married June 7, 1937. Shortly thereafter petitioner gave up his automobile business and, with his wife, lived in the home of respondent Sam Levin, and assisted him in his business until the latter part of 1937. Petitioner and his wife thereafter moved to East Moline where, from 1939 to December 26, 1941, he engaged simultaneously in

the operation of an automobile sales agency, a service station and a fur exchange. In 1938, while the couple were living in East Moline, Sherry Lee Bobroff was born. During this period in East Moline it appears that petitioner paid the rent on an apartment, later bought a home and generally supported his family. On December 27, 1941, petitioner, with his wife's consent, enlisted in the Air Force as a private and was stationed initially in Texas. After his enlistment his wife and daughter continued to live in East Moline until the early part of 1942. From that time until the early part of 1943 they lived with respondents except for a period of a few weeks when they were with petitioner at his station in Texas. In October, 1942, he was graduated as a Second Lieutenant from the Officers' Candidate School at Miami Beach, Florida, and remained stationed there until his discharge in October, 1945. From early 1943 until June, 1948, he and his wife lived in a rented apartment in Miami, Florida, together with their daughter and their son who was born in 1944. He supported his family while they lived together in Miami, paying for the education of the children and substantial amounts for medical and dental care for his wife. After his discharge from the service in October, 1945, he worked successively as a department store salesman, as an instructor in an auto driving school, as a real estate agent, and from November, 1946, until mid 1949, was associated with a drug and general sundries store in Miami Beach, initially as an employee and thereafter becoming a part owner of the business and taking an active part in the management thereof.

On June 19, 1948, he and his wife entered into a separation agreement apparently in contemplation of divorce and he thereupon departed for Reno, Nevada, intending to obtain

the operation of an automobile sales agency, a service station and a car exchange. In 1938, while the couple were living in East Moline, Sherry Lee Bobroff was born. During this period in East Moline it appears that petitioner paid the rent on an apartment, later bought a home and generally supported his family. On December 27, 1941, petitioner, with his wife's consent, enlisted in the Air Force as a private and was stationed initially in Texas. After his enlistment his wife and daughter continued to live in East Moline until the early part of 1942. From that time until the early part of 1943 they lived with respondents except for a period of a few weeks when they were with petitioner at his station in Texas. In October, 1942, he was graduated as a second lieutenant from the Officers' Candidate School at Miami Beach, Florida, and remained stationed there until his discharge in October, 1943. From early 1943 until June, 1944, he and his wife lived in a rented apartment in Miami, Florida, together with their daughter and their son who was born in 1944. He supported his family while they lived together in Miami, paying for the education of the children and substantial amounts for medical and dental care for his wife. After his discharge from the service in October, 1943, he worked successively as a department store salesman, as an instructor in an auto driving school, as a real estate agent, and from November, 1944, until mid 1949, was associated with a drug and general sundries store in Miami Beach, initially as an employee and thereafter becoming a part owner of the business and taking an active part in the management thereof.

On June 19, 1944, he and his wife entered into a separation agreement apparently in contemplation of divorce and he thereupon departed for Reno, Nevada, intending to obtain

a divorce. His wife, with both children in her custody, left Miami and took up her residence at the home of her parents, the respondents, in Macomb, Illinois. Shortly thereafter the divorce plans were apparently revised. His wife returned to Miami where she obtained a divorce from him in the Circuit Court of Dade County, Florida, July 9, 1948. The decree awarded the custody of both children to her, reserved to him the right of visitation at her home at all reasonable times and incorporated the terms of the separation agreement mentioned above, providing that he was to pay $60.00 per month for the support of the children. After entry of the decree Mrs. Bobroff returned to Macomb where she, together with her children, took up residence in the home of her parents. In May, 1949, petitioner underwent surgery for removal of a kidney. In the fall of 1949 he entered the University of Miami law school, but because of pain resulting from the surgery, dropped out until January, 1950, when he entered law school in DeLand, Florida. Again from September, 1950, to February, 1951, he dropped out of school because of illness occurring during the process of healing of the surgery. On the latter date he re-entered the University of Miami law school where he has been in regular attendance since and is to graduate in June, 1952. It appears that from December, 1950, until March, 1951, his monthly subsistence allowance under the Veteran Training Program in which he was enrolled was delayed and that during that period he had substantial hospital and medical expenses resulting from his surgery.

From the date of entry of the divorce decree until December 1, 1950, he paid all of the monthly payments specified in the decree with the exception of two. As to these pay-

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From the date of entry of the divorce decree until December 1, 1950, he paid all of the monthly payments specified in the decree with the exception of two. As to these pay-

ments he wrote Mrs. Bobroff on December 31, 1950, offering to let her sell his automobile then stored in Moline, the proceeds of sale to be credited upon support payments past and future, but the suggested sale was not carried out due to Mrs. Broboff's illness. As to the period from December, 1950, to May, 1951, he testified that he made no support payments because of his then inability to do so resulting apparently from his surgery and recuperation therefrom. He further testified that at Christmastime in 1948 he wrote to his children and paid for Christmas gifts which they requested; that from the time of the divorce in July, 1948, until May, 1951, he wrote his children thirty-five times or more; that he sent them $10.00 at a time on three different occasions asking that pictures of them be taken and sent to him and that his children corresponded with him, sending Christmas cards and Valentines but no pictures; that at the time of their birthdays in 1950, petitioner sent each of the children $10.00; and that he has maintained in force two $5,000.00 life insurance policies in which his children are designated beneficiaries. In May, 1949, while he was enroute to Chicago for the above mentioned surgery he visited the children in Macomb, took them to dinner and to a carnival. It appears that at all other times prior to the commencement of his action, he continued to reside in Florida, some eighteen hundred miles distant from Macomb, and had no other occasion to visit the children.

Per letter 6-10-

Mrs. Bobroff died May 29, 1952. Petitioner testified that he first learned of her death through a letter from his mother received about two weeks after the funeral and that he thereupon tried unsuccessfully to reach respondents by long distance telephone. Thereafter on June 27, 1951, on his verified petition,

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there was entered in the former divorce proceeding in the Circuit Court of Dade County, Florida, a decred modifying the prior decree by awarding custody of the two children to him. It is clear that no notice was given the children of the petition for modification of the decree and no guardian ad litem was appointed for them. Immediately thereafter he came to Macomb and on or about June 30, 1951, requested custody of his children from respondents, which request was refused. The children have continued to live with respondents since the death of their mother. They are both in school in Macomb and apparently in good health.

Respondent Sam Levin was sixty-four years old and his wife Edith Levin sixty-two years old at the commencement of this proceeding. It is conceded by petitioner that they are financially able to take care of the children. Sam Levin is a junk dealer and engaged in the automobile parts business. They reside in a three-bedroom second-floor apartment with modern facilities, the offices for his business being located on the first floor. Immediately to the rear is the junk yards with sheds, shops and storage areas used in connection with the business. The apartment building is situated in a commercial district a short distance from the railroad station and it appears that there are no play areas nearby.

In addition to his own testimony there was introduced on petitioner's behalf the testimony of eighteen other witnesses either in person or by deposition, all of whom were acquainted with him and had had occasion to observe either the conduct of his business affairs, his personal habits or his conduct toward his children for varying lengths of time over a period beginning in 1938, when he and his wife moved to

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In addition to his own testimony there was introduced on petitioner's behalf the testimony of eighteen other witnesses either in person or by deposition, all of whom were acquainted with him and had had occasion to observe either the conduct of his business affairs, his personal habits or his conduct toward his children for varying lengths of time over a period beginning in 1952, when he and his wife moved to

East Moline, down to and including the commencement of this action. The testimony of these witnesses was uniformly in substance that his reputation as a business man was very good and that he is a fit and proper person to have the custody of the children.

Respondents urge in their brief on appeal that four of the depositions were excluded by the trial court because of improper statements of petitioner's counsel made in the course of examination of the witnesses and that the depositions are, therefore, improperly included in the abstract and brief filed by him. However, the abstract as filed fails to show that the trial court ruled as they contend and they have not seen fit to file a further abstract in conformity with the rules of this Court. Moreover, it is not entirely clear, upon reference to the report of proceedings itself, that the trial court did, in fact, exclude the depositions in question. In any event, it does not appear that petitioner's case is aided to any critical extent by the challenged depositions and consequently it is not of decisive importance whether they are considered or not.

The testimony of respondents in their own behalf was in substance that they were willing and able to support and bring up the children. Neither testified that petitioner is either not competent to transact his own business or is not a fit person to have the custody of his children. Of the ten other witnesses for respondents, the testimony of six was confined wholly to their reputation as parents or grandparents, their circumstances and business reputation, and was uniformly in substance that their personal and business reputation was good, that their reputation as parents and grandparents was good, and that their

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facilities and circumstances for care of the children were adequate or good.

Of respondents' remaining witnesses, two testified that they were well acquainted with petitioner for varying periods while he was in the drug business in Miami, one of them being a former subtenant and the other a former employee. In addition, a former neighbor testified she had been well acquainted with him and his family while they lived in Miami. Both the former tenant and employee had been adversaries of petitioner in certain litigation resulting from their business association and both frankly admitted they did not like him, tending to show prejudice toward him in their testimony, the substance of which was that his reputation as a business man was not good and that he was not a fit person to have the custody of his children. The credibility of the testimony of the neighbor, that he is not a fit person to have the custody of his children is undermined to a considerable degree by the fact that much of her testimony is contrary to the preponderance of the other evidence.

In addition to the foregoing, respondents introduced certain testimony and exhibits apparently intended to show directly or inferentially an improper relationship between petitioner and one Claire Silvers who, together with her husband, were owners of the Miami drug store mentioned above at the time when petitioner first became associated with that business in 1946. One of the above mentioned witnesses formerly associated with the store testified that petitioner and Mrs. Silvers spent considerable time in a combination office and storeroom at the rear of the store, that he did not know what they did there but heard many loud arguments therefrom when he and Mrs. Silvers were in the office-storeroom and that on one occasion when the

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In addition to the foregoing, respondents introduced certain testimony and exhibits apparently intended to show directly or indirectly an improper relationship between petitioner and one Claire Silvers who, together with her husband, were owners of the Miami drug store mentioned above at the time when petitioner first became associated with that business in 1944. One of the above mentioned witnesses formerly associated with the above testified that petitioner and Mrs. Silvers spent considerable time in a combination office and storeroom at the rear of the store, that he did not know what they did there but heard many loud arguments therefrom when he and Mr. Silvers were in the office-storeroom and that on one occasion when the

witness knocked on the door thereof it took considerable time for someone to answer. The other witness who had also been formerly associated with the operation of the drug store testified that several times when he wanted to speak to petitioner or to Mrs. Silvers they were in the office, that he was told by Mrs. Silvers' daughter not to disturb them, that on one such occasion the door to the storeroom-office was locked and that petitioner and Mrs. Silvers opened the door a little later and called him in. This witness further testified that the relationship between the two did not appear to be strictly business. Their remaining witness testified that on the evening of August 29 or 30, 1951, which was approximately one month subsequent to the commencement of this action, he saw petitioner and Mrs. Silvers entering a theatre together in Miami Beach, Florida.

Both petitioner and Mrs. Silvers testified that they became close friends in the course of operation of the store, that they each necessarily worked long hours there at the same time as the store was open twenty-four hours a day, but denied that there was any improper relationship between them. Mrs. Silvers testified that her husband left her in 1946, approximately three months after petitioner became associated with the business, that she thereafter became well acquainted with him and his family and visited in their home from time to time and that in 1948, when friction developed between petitioner and his wife, she endeavored through separate conversations with each of them, to bring about a reconciliation for the sake of their children. She further testified that there had never been any intimacies between herself and petitioner and that she never discussed marriage with him until June, 1948, just prior to his above mentioned departure for Reno, which was apparently after the separation agreement between petitioner and his wife had been entered into. The evidence further

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shows that Mrs. Silvers obtained a divorce from her husband on July 29, 1948, approximately three weeks after the entry of the decree of divorce between petitioner and his then wife; that he and Mrs. Silvers were married August 21, 1948, but that the marriage was never consummated and that he obtained an annulment thereof on March 21, 1949.

Mrs. Silvers further testified that she does not now keep company with petitioner; that she sees him from time to time, sometimes at intervals of several weeks; that there has been no discussion of remarriage between them and that she has no desire for remarriage. To the same general effect he testified that he has no plans of a stepmother for the children, is not keeping company with anybody now and that he is quite frequently with his former wife. The major portion of the foregoing facts relative to the relationship between him and Mrs. Silvers, their marriage and the annulment thereof, were introduced into evidence before the trial court by respondents, as was a transcript of the annulment proceeding. In spite of this they have placed but little, if any, emphasis upon this phase of the evidence in their statement, brief and argument, so that it has been necessary to cull the substance of the foregoing evidence from the statement and argument of petitioner. Neither party, moreover, has abstracted the annulment proceeding introduced as an exhibit by respondents but because of the fact that the relationship between petitioner and Mrs. Silvers was apparently one of the decisive factors leading the trial court to deny the relief sought, it has become necessary to an adequate evaluation of the evidence to search not only the abstract but the record itself and the exhibits therein contained.

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From such search the following enlightenment is gained. The abstract shows that Mrs. Silvers testified on cross-examination that the ground for annulment of the marriage was an illicit affair on her part and that petitioner paid her $5,000.00 for reasons not indicated in the abstract. Reference to the report of proceeding, in turn, shows the following: The original annulment complaint alleged as ground therefor that Mrs. Silvers misrepresented to petitioner her desire to marry him in order to obtain from him $5,000.00 to be utilized in a property settlement in the divorce action between Mrs. Silvers and her then husband; that after the marriage ceremony Mrs. Silvers refused to accept his name, refused to be recognized as his wife, and admitted former cohabitation with a man not her husband. Thereafter the annulment complaint was amended to allege, as in the original, misrepresentation on the part of Mrs. Silvers for the purpose of obtaining $5,000.00 to effect a property settlement with her husband, to allege Mrs. Silvers' refusal to allow petitioner the privileges of a husband, to be recognized as his wife, to accept his name or to live with him as husband and wife. At the hearing on the complaint for annulment his testimony was introduced substantiating the allegation of the amended complaint and in addition there were introduced as exhibits three letters written by Mrs. Silvers to him during the period June 8 through June 13, 1948, while he was in Reno, Nevada, as hereinabove mentioned. These letters express in lavish terms Mrs. Silvers' love, admiration, affection, need and lonesomeness for petitioner and are the letters referred to by the trial court when, by implication, it concluded that the relationship petitioner and Mrs. Silvers had was at least improper.

Mrs. Silvers testified that his response to these letters was cool toward her and expressed concern primarily for

From such a search the following enlightenment is gained. The abstract shows that Mrs. Olivers testified on cross-examination that the grand jury amendment of the marriage was an illicit affair on her part and that petitioner paid her $5,000.00 for reasons not indicated in the abstract. Difference in the report of proceedings, in that, shows the following: The original amendment complaint alleged in proper manner that Mr. Olivers misrepresented to petitioner her desire to marry him in order to obtain from him $5,000.00 to be utilized in a property settlement in the divorce action between Mr. Olivers and her then husband; that after the marriage ceremony Mr. Olivers refused to accept his name, refused to be recognized as his wife, and admitted former cohabitation with a man not her husband. Thereafter the amendment complaint was changed to allege, as in the original, misrepresentation on the part of Mrs. Olivers for the purpose of obtaining $5,000.00 by signing a property settlement with her husband, to allege Mrs. Olivers' refusal to allow petitioner the privilege of a husband, so as to recognized as his wife, to accept his name or to live with him as husband and wife. At the hearing on the complaint for amendment his testimony was introduced substantiating the allegation of the amended complaint and in addition there were introduced in evidence three letters written by Mrs. Olivers to him during the period June 8 through June 12, 1942, while he was in Mexico, Texas, in Marine shore headquarters. These letters expressed an Naval terms Mrs. Olivers' love, adoration, affection, need and longingness for petitioner and how the letters relieved to ease the trial court when, by implication, it concluded that the relationship petitioner and Mrs. Olivers had was at least improper.

Mrs. Olivers testified that she responded to those letters was cool toward her and expressed reasons primarily for

his children and both she and petitioner testified that she fully repaid, during the winding up of her business affairs in 1949, the $5,000.00 which he had advanced to her in connection with her divorce proceeding against Silvers. Petitioner testified that he had made arrangements for the children and himself to live in a residential section of Miami in the four-bedroom residence of friends with whom he and his children became acquainted in the period following his discharge from the Army. It appears that he had previously lived in this home and that he and Mrs. Bobroff and their daughter at one time lived there for several weeks while the owners were on vacation. He further testified that he has arranged for part time work in a store operated by the owner of this home and that in addition he will have adequate time with his children because of a relatively light school program. It further appears that as a former military officer, he will be entitled throughout his lifetime to receive a disability retirement allowance of $156.90 per month, although he has now recovered from the disability which he incurred while in military service. He represents that with this retirement allowance and his earnings from part time work and his contemplated earnings upon completion of law school he will be able to adequately support his children. He contends that on this record the judgment of the trial court denying his petition is contrary to law and against the manifest weight of the evidence and further that the court erred in refusing to give full faith and credit to the decree of the Circuit Court of Dade County, Florida, awarding the custody of the children to him.

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The trial court, in announcing its decision, mentioned the following primary factors which it apparently regarded as decisive. (1) He intends to take the children into a home where their care will be delegated for the most part to people who are total strangers under an arrangement which is, at best, only temporary. (2) He is entirely dependent financially upon sums received from the government which sums have been insufficient to enable him to maintain himself and make the support payments for his children specified in his divorce decree, his promises to get additional employment are problematic as is the question of the amount of time which he will be able to give his children. (3) His past relationship with Mrs. Silvers, both before and after his divorce from the mother of the children was more than a business relationship, reflecting unfavorably upon his character. (4) He has not seen his children for the past three years, has made no effort to contact them other than by writing letters and has not been sufficiently interested to see that support money was paid for them. (5) Respondents are people of good character and reputation, have a home which is satisfactory, are financially able to care for the children in a fit and proper community for the raising of children, where all of their close relatives reside in close proximity. The Court concluded that permitting them to retain custody of the children would best serve the interests and welfare of the children and that being the sole question before it, denied the petition.

The decision of the Supreme Court in People v. Wingate, 376 Ill. 244, while not relied on by respondents, appears decisive in their favor on the preliminary question raised by petitioner, namely, whether the decree of the Circuit Court of

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The decision of the Supreme Court in People v. Fitzgerald, 375 Ill. 254, which has relied on by respondents, appears decisive in their favor on the preliminary question raised by petitioner, namely, whether the decree of the Circuit Court of

Dade County, Florida, modifying the original divorce decree and awarding custody of his children to him is entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States. The rule stated in that decision is, in our opinion, applicable here, and is as follows:

> "Decrees entered in divorce actions disposing of the custody of a child then outside the jurisdiction of the State where the decree is entered are generally held not to be entitled to full faith and credit in a proceeding involving the child's custody in an action begun in a State other than where the decree was entered . . . .
>
> "The jurisdiction of a State to regulate the custody of infants found within its territory does not depend upon the domicile of the child. It arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants."

It appears that the law of the State of Florida, as announced by its Supreme Court in Dorman v. Friendly, 146 Fla. 738, 1 S. (2) 734 is in accord.

Decision of this appeal depends upon proper construction and application of Paragraph 284, Chapter 3, Illinois Revised Statutes, which provides:

> ". . . .If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is. . .entitled to the custody of the person of (his) minor (child) and the direction of his education."

The rule of construction perhaps most frequently announced in decisions construing this provision of the statute is:

> "A parent has the right to the custody of his child as against all the world, unless he has forfeited his right or the welfare of the child demands that he should be deprived of it." (Hohenadel v. Steele, 237 Ill. 229; Sullivan v. People, 224 Ill. 468; Harmon v. Starbody, 219 Ill. App. 603)

Certain other decisions construing the foregoing statute have adhered to this statement of the law but have placed greater

Dade County, Florida, nullifying the original divorce decree and awarding custody of his children to him is entitled to full faith and credit under Article IV, Section 1 of the Constitution of the United States. The rule stated in that decision is, in our opinion, applicable here, and is as follows:

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It appears that the law of the state of Florida, as announced by its Supreme Court in Duncan v. Friendly, 1[illegible] Fla. [illegible], 1 So. (2) 714 is in accord.

Decisions of state appellate courts upon proper construction and application of Interpleader, Chapter 3, Illinois Revised Statutes, which provides:

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> "A parent has the right to the custody of his child as against all the world, unless he has forfeited his right or the welfare of the child demands that it should be deprived of it."
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Certain other decisions construing the foregoing statute have adhered to this statement of the law but have placed greater

apparent emphasis on the welfare of the child, holding that its interest or welfare is the controlling or primary factor to be considered in cases of this nature. (Cormack v. Marshall, 211 Ill., 519; Scott v. Ashcraft, 342 Ill.App., 33; People v. Weeks, 228 Ill., App.262). Conversely, still other decisions have emphasized the right of a fit parent to the custody of his child with no reference being made expressly, at least, to its welfare. (People v. Sheehan, 373 Ill., 79; Stafford v. Stafford, 299 Ill. 438).

Respondents urge that the sole issue on this appeal is the welfare or best interest of the minor children and assert petitioner's position to be that he, as surviving parent, is entitled, in the circumstances shown, to the custody of his children as a matter of right. Whether this is a wholly accurate statement of his position is questionable. In any event, respondents in so contrasting the positions of the parties, raise the question whether the above decisions which emphasize the "right" of a "fit" parent are reconcilable with those emphasizing the "welfare" of the child, and if not which should prevail.

This question prompts a closer examination of the relationship between parental "right" and "fitness" on the one hand, and child "welfare" on the other, than has been undertaken in many of the foregoing decisions. That such relationship does exist is at once as apparent from even a rudimentary knowledge of family relations as it is from consideration of the rule of construction announced in numerous decisions and quoted above. Thus it is in general safe to assume that if a parent is "fit" and reasonably able to provide for his child, placing its custody with such parent is conducive to its "welfare". On the other hand, if the initial inquiry is directed to the "Welfare" of the child, in complete disregard of parental "right", it will usually be found best served in the custody of a parent who is "fit" and able to provide for it if for no other reason than the

apparent emphasis on the welfare of the child, holding that its interest or welfare is the controlling or primary factor to be considered in cases of this nature. (Cormack v. Bernhill, 211 Ill., 419; Scott v. Ashcraft, 342 Ill.App.,33; People v. Weeks, 227 Ill.App.202). Conversely, still other decisions have emphasized the right of a fit parent to the custody of his child with no reference being made expressly, at least, to its welfare. (People v. Burnham, 279 Ill.,72; Stafford v. Stafford, 209 Ill.,434).

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importance of the parent-child relationship to the child's adjustment and wellbeing. Because of this high degree of correlation between "fitness" and "welfare", custody may, with good reason, be awarded in all but exceptional cases upon consideration of either factor or both, so that in spite of the divergent formulations of the applicable law announced in the above cited decisions the rules stated therein as well as the results reached are to that extent reconcilable.

In apparent accord with the foregoing, it has been held that the "law presumes the interest and welfare of the child to be best served in the custody of its (parent)". People v. Hoff, 323 Ill. App.535; Jarrett v. Jarrett, 348 Ill. App.1). To the extent that there is such positive correlation between "right" and "welfare", it is pertinent to inquire whether any useful purpose is served by retention in the law of both concepts. Otherwise stated, are there in fact two separate elements, the "fitness" of the parent and the "welfare" of the child, to be separately determined and subsequently weighed, or does "welfare" inevitably result in all cases upon determination that "fitness" exists?

If the above noted presumption is conclusive and not rebuttable, it would appear that once the "fitness" of the parent is determined any separate or additional inquiry into the "welfare" of the child is a superfluous gesture tending merely to confusion and that the "welfare" concept is useless except insofar as it may suggest the scope of investigation into the initial question, parental "fitness".

In our opinion, however, it is reasonably clear from the decisions in which the matter has received consideration, as it must be in principle, that the foregoing presumption is rebuttable

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and that the "fitness" of the parent and the "welfare" of the child while closely related as above noted, are and must be kept as separate and distinct questions in these cases. (Jarrett v. Jarrett, supra; Scott v. Ashcraft, supra). If the distinction is not maintained and the "welfare" of the child is conclusively presumed from the "fitness" of the parent, the latter consideration, which is clearly the more important, as it has repeatedly been held to be, will become an empty form and in those exceptional cases in which in spite of the fact that the parent is "fit", the "welfare" of the child is better served in the custody of another, any meaningful consideration of "welfare" will be overridden in the name of parental "right".

As long ago as its decision in Cowls v. Cowls, 8 Ill. 435, the Supreme Court held that "it is not the rights of the (parent) that we are to enforce, . . .but it is the interests of the infants that are to be protected." (See also to the same effect the elaborate majority and dissenting opinions in Hewitt v. Long, 76 Ill. 399). More recently in Cormack v. Marshall, supra, the Supreme Court quoted with approval the following statement of the Kansas Supreme Court:

> "But the distinction between. . . .the comparative rights of two conflicting claimants and ....what is for the best interest of ~~the~~ a child is real and vital."

In commenting upon this statement, the Illinois Supreme Court remarked as follows:

> "We recognize the distinction made, and understand it to be the duty of any court, in considering the question of the disposition of the custody of a child, to keep that distinction before it. The parent has the superior right to the child, but the superior right of the parent must yield to the best interest of the child. There is a recognition of both the rights, although the parent has the superior right, which is a true statement of an abstract proposition. He only has that superior right when it accords with the best interest of the child."

The relationship between "right" and "fitness" on the one hand and "welfare" on the other is clarified through consideration of those cases in which the contest for custody arises between persons whose claims of right to custody are equal, as when both contestants are parents asserting basically equal "rights", as well as those in which both contestants are non-parents so that neither has a greater claim of right than the other.

In these situations, it has regularly been held that the only valid criterion for deciding the custody question is the welfare of the child with due consideration being given to the relative "fitness" of the claimants in determining the "welfare" question. If welfare of the child is the primary consideration in these cases there is no valid reason in the nature of things why the basic principle of decision should be any different when one claimant is a parent and we know of no case expressly announcing a contrary rule. This does not mean, however, that the fact that one claimant is a parent is irrelevant and that the welfare of the child is to be determined without regard to that fact, simply in terms of relative ability or fitness of the two claimants. To the contrary, the very fact that one of the claimants is a parent is not only highly relevant <u>to the "welfare" question</u> but in many cases decisive, not because of the superior right of the "fit" parent but because of the grave importance to the "welfare" of the child inherent in the parent-child relationship. It is the salutary effect of this relationship upon the welfare of the child in the ordinary case, and not the "right" of the parent as such, which in our opinion constitutes the sole valid reason and at the same time the overwhelmingly important reason for regarding as relevant, upon consideration of the "welfare" question, the fact that one claimant is a parent.

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If, in addition, the "right" of the parent is injected into consideration of the "welfare" question the two factors become of equal importance in contradiction of the original premise that "welfare" is of primary importance.

The ultimate extent to which the decisions construing the foregoing statutory provisions are reconcilable, either as to the rules of law announced therein or the results reached must be regarded as a matter of some conjecture. Many of them based upon a determination that the parent was "fit" might with equal plausibility have been grounded upon the "welfare" of the child. Similarly, in those instances in which custody was denied a parent and awarded to a non-parent on the ground that the parent was unfit, it would have been equally in conformity with the usual meaning of the term to have held that the child's "welfare" was better served in the custody of the latter. Unless both factors are regularly delineated and examined the distinction between them tends to become obscured as noted above with the result that parental "right" is in fact accorded more weight than "welfare" of the child. One may suspect moreover that some of those decisions nominally adhering to and announcing the rule that "welfare" is of primary importance, in fact proceed on the premise that the above mentioned presumption is not rebuttable which for the reasons indicated leads to the same unsound result.

From the foregoing it must be concluded that in this and similar cases, while the fitness of a parent-claimant and the welfare of the child are intimately related elements which tend to identity in most cases, because they may be disparate in some cases, each must be examined with care, and that as the "welfare" of the child is of primary and controlling importance, the "right" of even a "fit" parent must be subordinated thereto in appropriate

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cases. It is further concluded that while the welfare of the child is the primary factor or the ultimate issue to be determined irrespective of the relationship of the claimants to the child, it is inaccurate in general and particularly misleading when one claimant is a parent, to declare as the trial court did in this case that child welfare is the "sole" issue because of the resulting tendency to disregard not only parental "right" accorded by the statute but also the importance of the parent-child relationship.

In this case there is a rather full statement by the trial court of the reasons for its decision from which it clearly appears that, proceeding on the thesis that the welfare of the children is the sole issue, the Court attempted to weigh the relative ability of the claimants to provide for the financial, moral, physical, spiritual and educational needs of the children, as if the claimants were equally entitled to the custody of the children, but without any express determination of the question of petitioner's fitness and with virtually no consideration of the parent-child relationship. In the opinion of the Court the judgment of the trial court is contrary to the law and to the manifest weight of the evidence.

A parent's fitness to have the custody of his children is presumed unless the contrary is clearly established. The testimony primarily tending to sustain this burden of proof for respondents is that of three witnesses, two of whom were admittedly unfriendly to petitioner, and the credibility of the third being open to serious question on other grounds.

On the other hand the numerous witnesses on petitioner's behalf who testified that he was a fit parent, while no doubt friendly toward him, apparently based their opinions on specific

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On the other hand the numerous witnesses on petitioner's behalf who testified that he was a fit parent, while no doubt friendly toward him, apparently based their opinions on specific

incidents demonstrating his conduct and attitude toward his children. Moreover it appears that two of these witnesses had at one time been unfriendly toward him because of differences between them arising out of business disputes and resulting in litigation in circumstances similar to those which antagonized two of the witnesses causing them to be prejudiced against petitioner.

The other factors considered by the trial court and relied upon by respondents which appear in any way relevant to petitioner's fitness, are his financial ability to provide for and generally minister to the needs of the children, his relationship with Mrs. Silvers, and his infrequent contact with them in recent years. As to the first of these it appears that while petitioner has not fully supported the children at any time since his divorce from their mother, he has contributed considerable amounts therefor and that except for the period immediately prior to the mother's death he has substantially complied with the terms of the divorce decree as to their support. It does not appear that his failure to fully comply with the decree is due to wilful neglect on his part but rather to his own straitened circumstances arising largely from his own illness. Of perhaps greater relevance in forecasting his future financial ability is the fact that he has shown himself capable of supporting his wife and children for considerable periods while they lived together as a family, and the further fact that he appears to have in his disability pension an assured minimum income for the remainder of his life in addition to income which he may reasonably expect to receive in his contemplated profession. Neither does it appear in our opinion that he will not have adequate time away from his work to look after the children or that the living arrangement he

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has made for them in Miami is any more tentative or unsettled than in the usual landlord-tenant relationship. Moreover it affirmatively appears that the neighborhood environment of this home is superior to that which exists where they now reside with respondents, that it is just as conveniently located if not more so with respect to schools, play areas and churches of the faith of petitioner and his children, and that the owners of the home in question are not strangers either to petitioner or his children. All of these factors are relevant not only on the "fitness" issue but on the "welfare" question as well. Conceding that respondents are better able financially to provide for the children than petitioner is at the present time, it is well established that "the mere fact that other relatives...might give better care, and spend more time and money upon the child, is no reason for depriving the father of its custody. It is not a question of relative ability...but the sole question is whether the father is able and will give the child good care and treatment." (Wohlford v. Burckhardt, 141 Ill. App. 321; Stafford v. Stafford, 299 Ill. 438; Cormack v. Marshall, supra).

As to the relationship between petitioner and Mrs. Silvers, the evidence, in our opinion, simply does not sustain an inference that his actions in regard thereto have been immoral or improper in any significant sense. In Scott v. Ashcraft, 342 Ill. App. 33, there was a clear transgression by the father of the bounds of conventional morality, it having been stipulated that he had lived with a woman out of wedlock for a period of eight years. This Court nevertheless viewed his conduct as past misbehavior, which although not condoned, was insufficient in the circumstances there shown to deprive the father of custody on the ground of unfitness.

has made for them in mind is any more tenuous or unsettled than in the usual landlord-tenant relationship. Moreover it affirmatively appears that the neighborhood environment of this home is superior to that which exists where they now reside with reasonableness, than it is just as conveniently located if not more so with respect to schools, play areas and churches of the father of petitioner and his children, and that the owners of the home in question are not strangers either to petitioner or his children. All of these factors are relevant not only on the "fitness" issue but on the "welfare" question as well. Conceding that respondents are better able financially to provide for the children than petitioner is at the present time, it is well established that "the mere fact that other relatives...might give better care, and spend more time and money upon the child, is no reason for depriving the father of his custody. It is not a question of relative ability...but the sole question is whether the father is able and will give the child good care and treatment." (Woolford v. Burchard, 141 Ill.App.,[illegible]; Stallcup v. Stallcup, 227 Ill.App.[illegible]; Gorsack v. Gorsack, [illegible]).

As to the relationship between petitioner and his children, the evidence, in our opinion, simply does not sustain an inference that his actions in regard thereto have been immoral or improper in any significant sense. In Scott v. Scott, 346 Ill. App.33, there was a clear transgression by the father of the bounds of conventional morality, it having been stipulated that he had lived with a woman out of wedlock for a period of eight years. This Court nevertheless viewed his conduct as just misbehavior, which although not condoned, was insufficient in the circumstances there shown to deprive the father of custody on the ground of unfitness.

Finally, while petitioner's infrequent personal visitation of his children might be regarded as an indication of his disinterest and therefore lack of general fitness, as well as an unfavorable reflection on their welfare in his custody, his conduct in this regard is not, in our opinion, entitled to the significance attached to it by the trial court. It has not been seriously contended, if at all, that the children have been abandoned by petitioner and his support payments coupled with the fact that he apparently corresponded quite regularly with his children would negative any such contention. The facts already stated sufficiently show that it would have been extremely difficult if not impossible for him to visit his children more frequently than he did in the circumstances which existed, and that in spite of the fact that they have been separated for some time he is in no sense a stranger to them.

In our opinion the manifest weight of the evidence reviewed immediately above is that petitioner is "fit" to have the custody of his children and to that extent their custody with him is also conducive to their "welfare". It remains to be considered what elements of proof, if any, tend to the contrary on the "welfare" issue.

Wilkinson v. Deming, 80 Ill. 342, and the decision of the Supreme Court in People v. Small, 237 Ill. 169, relied upon by respondents are both clearly based upon a recognition of the power of a parent having custody of a child to appoint its testamentary guardian and are therefore inapplicable here. (See Stafford v. Stafford, 299 Ill. 438).

For reasons already sufficiently suggested it is not surprising to find a dearth of decisions which either involve or discuss in concrete terms those circumstances in which, de-

Finally, while defendant's subsequent personal disposition of his children might be regarded as an indication of his deliberate and therefore lack of general intent, it will be an unfavorable reflection on their welfare if his conduct, as conduct in this regard is not, in our opinion, entitled to the significance ascribed to it by the trial court. It has not been entirely consistent, if at all, since the children have been committed by petitioner and the support payments coupled with the fact that he apparently contributed quite regularly after his children were legally his wards contribution. The trial court already stated sufficiently that that it would have been extremely difficult if not impossible for him to visit his children more frequently than he did in the circumstances which existed, and that in spite of the fact that they did have some any-- sense or some time he is to make a strong to them.

In our opinion the evidence taking it the evidence relied immediately above is not particular in "fact" to have the respect of the children and to that without evidence which also is also conducive to their "welfare". It remains to be considered what elements of fact, if any, tend to the contrary to the "welfare" issue.

Atkinson v. Dwyer, 60 Ill. 235, and the decision of the courts there to Jones v. Jones, 137 Ill. 167, relied upon by respondents are not clearly based upon a recognition of the power of a court having custody of a child to supply its temporary needs for its therefore inadmissible and. (See Bedford v. Bedford, 192 Ill. 237).

For reasons stated sufficiently suggested it is not surprising to find a dicta or decisions which either involve or dismiss in concrete terms these circumstances in which, de-

spite a finding that the parent is fit, the welfare of the child demands his custody with another. While not relied upon by respondents, the decision in People v. Weeks, 228 Ill.App. 262, concretely shows one set of such circumstances in which parental "right" appears in fact to have been subordinated to child "welfare", and in so doing more nearly supports respondents' position than any other case which has come to our attention. There the controversy was between the father and the aunt of the child whose custody was in question. It appeared that the father and the aunt were equally fit, and while there was some evidence suggesting that the father had abandoned or relinquished to the aunt his right to custody, we do not understand that the decision awarding custody to the aunt was based on that theory or finding, as is suggested in the First District Court's later decision in People v. Hoff, 323 Ill.App. 535. To the contrary, it is specifically grounded upon the finding that it "appeared reasonably certain considering all the circumstances that it would be better for the welfare of the child that it should remain with (the aunt)". It seems evident that the primary factor impelling the Court to this conclusion was the close relationship between the child and her aunt, and the child's love, esteem, and affection for her which had developed during a period of nearly ten years of continuous residence with her aunt, beginning when the child was about two and one-half years old. In addition, the child expressed a positive preference to remain with the aunt. The Court concluded in these circumstances that unnecessary pain and suffering would result to the child if the relationship which had its origin with the father's consent were broken and that in addition great harm to the adjustment of the child might ensue if her custody were abruptly changed at that period in her

suite a finding that the parent is ill, the welfare of the child demands his custody with another. While our ruling upon by reasonableness, the decision in People v. Lewis, 328 Ill.App.,[illegible], concretely shows one set of such circumstances in which natural "right" appears in fact to have been subordinated to child "welfare", and in so doing more nearly protects [illegible] position than any other also which has come to our attention. There the controversy was between the father and the aunt of the child whose custody was in question. It appeared that the father and the aunt were equally fit, and while there was some evidence suggesting that the father had abandoned or relinquished to the aunt his right to custody, we do not understand that the decision awarding custody to the aunt was based on this theory or finding, as is suggested in the Appellate Court's lengthy decision in People v. Hunt, 328 Ill.App.,[illegible]. To the contrary, it is categorically grounded upon the it stay that [illegible] certain considering all the circumstances that it would be better for the welfare of the child that it should remain with (the aunt)'. It seems evident that the primary factor impelling the Court to this conclusion was the close relationship between the child and her aunt, and the child's love, affection, and attention for her which had developed during a period of nearly ten years of continuous residence with her aunt, beginning when the child was about two and one-half years old. In addition, the child expressed a positive preference to remain with the aunt. The Court concluded in these circumstances that unnecessary pain and suffering would result to the child if the relationship which had its origin with the father's consent were broken and that in addition great harm to the advancement of the child might ensue if her custody were abruptly changed at that period in her

life. It is the considered opinion of this Court that in so basing its decision on the welfare of the child, the First District Court, in the circumstances there shown, reached a manifestly correct decision.

The circumstances appearing in the instant case, while similar in some degree, differ in significant respects from those existing there. While the children in this case have lived in the home of respondents since mid 1948 and have apparently been in their sole care since the death of the mother in May, 1951, they have not so lived continuously during all of their formative years as did the child in the Weeks Case. The age of both these children is such that they presumably have some recollection of a reasonably well adjusted and integrated family life in the home of petitioner prior to the divorce. The preponderance of the testimony is that the home was a relatively happy one in which they received from petitioner a considerable measure of attention and devotion. It is true that if their custody is awarded to their father, there will inevitably be a considerable readjustment to be made by them in getting settled in their new surroundings and in acquiring new friends. However, all of these exigencies, whether they be regarded as hazards or challenges, must be met whenever a family moves from one locality to another. In our opinion, the significant distinction between this and the Weeks Case is that there is no showing here that a relationship between respondents and these children has yet come into being which approaches in intensity that existing in the Weeks Case where at the same time the father of the child was far more nearly a stranger to his child than petitioner is to his children.

life. It is the considered opinion of this Court that in so basing its decision on the welfare of the child, the Trial Judge, in the circumstances above set out, reached a manifestly correct decision.

The circumstances appearing in the instant case, while similar in some degree, differ in significant respects from those existing there. While the children in this case have lived in the home of respondents since mid 1947 and have accurately been in their sole care since the death of the mother in May, 1951, they have not so lived continuously during all of their formative years as did the child in the Wells Case. The age of both these children is such that they reasonably have some recollection of a reasonably well ordered and loving family life in the home of petitioner prior to the divorce. The preponderance of the testimony is that one does not a relatively happy one in which they received from petitioner a considerable measure of affection and devotion. It is true that if their custody is awarded to their father, there will inevitably be a considerable readjustment to be made by them in getting settled in their new surroundings and in acquiring new friends. However, all of these circumstances, whether they be regarded as hazards or obstacles, must be met wherever a family moves from one locality to another. In our opinion, the significant distinction between this and the Wells Case is that there is no showing here that a relationship between respondents and these children has yet come into being which approaches in intensity that existing in the Wells Case where at the same time the father of the child was far more nearly a stranger to his child than petitioner is to his children.

The only other factor shown by this record which tends in any degree to suggest that the custody of these children should not be changed for reasons of their "welfare" is the indication of a certain lack of stability on petitioner's part as he has repeatedly shifted from one occupation or pursuit to another and as his matrimonial status has changed from time to time with seeming abruptness. However, his apparent determination to better his position is laudable and he has shown ability and resourcefulness in providing for his family while he has been in good health. In our opinion the significance of these factors is outweighed by the fact that in petitioner's custody the children will be with the person who is, in fact, their father, and who, as such, bears a more favorable age relationship to them than respondents. So far as the evidence shows, petitioner has for his children the full measure of regard for their happiness and wellbeing which is, in the usual case, one of the natural results of the parent-child relationship.

For these reasons the determination of the trial court that the welfare of the children demands that respondents retain their custody is, in our opinion, contrary to the manifest weight of the evidence.

The judgment of the Circuit Court of McDonough County denying the petition for writ of habeas corpus and remanding the children to the custody of respondents is reversed and the cause remanded with directions to modify the judgment in accordance with the views expressed herein and to award the custody of the children to petitioner.

Reversed and remanded with directions.

The only other factor shown by this record which tends in any degree to suggest that the custody of these children should not be changed for reasons of their "welfare" is the indication of a certain lack of stability on petitioner's part as he has repeatedly shifted from one occupation or pursuit to another and as his matrimonial status has changed from time to time with seeming frequency. However, his apparent determination to better his position is laudable and he has shown ability and resourcefulness in providing for his family while he has been in good health. In our opinion the significance of these factors is outweighed by the fact that in petitioner's custody the children will be with the person who is, in fact, their father, and who, as such, bears a more favorable relationship to them than respondents. So far as the evidence shows, petitioner has for his children the full measure of care for their comfortness and wellbeing which is, in the usual case, one of the natural results of the parent-child relationship.

For these reasons the determination of the trial court that the welfare of the children demands that responsibility remain their custody is, in our opinion, contrary to the constituent weight of the evidence.

The judgment of the Circuit Court of Jackson County denying the petition for writ of habeas corpus and remanding the children to the custody of respondents is reversed and the cause remanded with directions to vacate the judgment in accordance with the views expressed herein and to award the custody of the children to petitioner.

Reversed and remanded with directions.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

A 3523

Abstract

May Term, A. D. 1953.

General No. 9861

Agenda No. 7.

EDWARD N. BELL and ELOISE C. BELL,
Plaintiffs-Appellees,

vs.

THOMAS E. HIGHLAND,
Defendant-Appellant.

Appeal from the Circuit Court of Macon County, Illinois.

350 I.A. 501

REYNOLDS, J.

This is an appeal from two judgments rendered in the Circuit Court of Macon County in favor of Edward N. Bell in the amount of $1,600.00 and in favor of Eloise C. Bell in the amount of $1,500.00, both judgments being against Thomas E. Highland, the defendant. The plaintiffs were guests in the car of the defendant and were injured in an accident when the car skidded off the pavement on the highway south of Decatur, Illinois and struck a tree.

The accident occurred on February 26, 1950 at about 12:30 A. M., about one-half mile south of Decatur. The pavement had patches of ice and the streets in the City of Decatur were covered with ice. The defendant with the two plaintiffs and his wife were driving south on the highway from Decatur. The car was proceeding at approximately 30 miles per hour. It appears that the plaintiffs had called the defendant and suggested that they and the defendant and his wife go out dancing; that the defendant took his car and the two couples drove to a tavern in Decatur; that in driving in the streets of Decatur, because of the icy condition, the car skidded a short time after they left the home of the plaintiffs. There is some testimony about the defendant moving the wheel from side to side and that the car skidded crossways in the street. About midnight the two couples, namely, the plaintiff and his wife and the defendant and his wife decided to go to Macon, Illinois. Because

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

A. D. 1952.

May term,

General No. 9861

Agenda No. 7.

EDWARD E. GOLD and DORIS G. GOLD,
Plaintiffs-appellees,

vs.

GEORGE E. KEARLAND,
Defendant-appellant.

Appeal from the
Circuit Court of
Mason County, Illinois.

MCCONLOGUE, J.

This is an appeal from two judgments rendered in the Circuit Court of Mason County in favor of Edward E. Gold in the amount of $1,600.00 and in favor of Doris G. Gold in the amount of $1,500.00, with judgments being against George E. Kearland, the defendant. The plaintiffs were guests in the car of the defendant and were injured in an accident when the car skidded off the pavement on the highway south of Decatur, Illinois and struck a tree.

The accident occurred on February 26, 1950 at about 12:30 A. M., about one-half mile south of Decatur. The pavement had patches of ice and the streets in the City of Decatur were covered with ice. The defendant with the two plaintiffs and his wife were driving south on the highway from Decatur. The car was proceeding at approximately 30 miles per hour. It appears that the plaintiffs had called the defendant and suggested that they and the defendant and his wife go out dancing; that the defendant took his car and the two couples drove to a tavern in Decatur; that in driving in the streets of Decatur, because of the icy condition, the car skidded a short time after they left the home of the plaintiffs. There is some testimony about the defendant moving the wheel from side to side and that the car skidded crosswise in the street. About midnight the two couples, namely, the plaintiff and his wife and the defendant and his wife decided to go to Mason, Illinois. Because

the temperature was around zero and the heater in the car only served the front seat, all four sat in the front seat with the defendant driving. There does not seem to be any claim on the part of anyone that the defendant did not drive carefully and cautiously and on the proper side of the highway from the time they left the tavern until the accident occurred. The plaintiffs base their case on the charge of willful and wanton misconduct on the part of the defendant in that he turned his wheel suddenly when the skid started, as a matter of showing off and this caused the skid and the accident. The defendant assigns as error, eleven grounds for reversal.

Of the errors assigned, Nos. 1, 2, 3, 8, 9, 10 and 11 all go to questions of fact that were determined by the jury in the case. We have repeatedly held that the reviewing court would not disturb a finding of fact by a jury or trial court unless clearly and palpably erroneous. Sullivan v. Morey, 326 Ill. App. 553; Lurie v. Newhall, 333 Ill. App. 173 and Hubele v. Baldwin, 332 Ill. App. 330. However, when the decisions or findings of fact determined by the jury may have been induced by reason of improper evidence considered by the jury, then a different situation results. Then the reviewing court must take action if the improper evidence is such that reversible error occurs. Numbers 4 and 5 of the errors assigned, should be considered together, namely that improper evidence was permitted to be heard by the jury and that the striking of the improper evidence later by the court with instructions to disregard it, does not cure the error. The defendant complains of two matters, namely that evidence about the defendant being a stock car driver or race driver and the evidence about the stranger calling on the plaintiff Edward N. Bell at the hospital, in company with the defendant and taking notes of what was said by plaintiff, but which plaintiff refused to sign. This evidence concerning the stranger was not objected to at the time of its offer or any motion

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for a mistrial made and therefore it was waived, if it did constitute reversible error.

The question of the cross examination of defendant in regard to stock car driving is a different matter. In the opinion of this court, the testimony as to that was improper and should not have been permitted to go before the jury. It had no bearing on the points at issue and only tended to prejudice the rights of the defendant. As said in Thillman v. Early, 340 Ill. App. 538: "It is difficult for the ordinary juror, not to consider all of the evidence that has been given before them." Here the testimony was introduced about the defendant engaging in stock car racing. It is true that the court struck the evidence later in the trial and instructed the jury to disregard it but the jury had heard the testimony and may have considered it in reaching their verdict and later, other questions were again asked about the defendant's driving stock cars or about training and this was not ordered stricken or the jury instructed to disregard it. We think this may have resulted in prejudice to the rights of the defendant as the jury may have considered it in reaching its verdict and that it constitutes reversible error and that the ruling of the court in striking the evidence and instructing the jury to disregard it, did not cure the error. McCarthy v. Spring Valley Coal Co., 232 Ill. 473, at page 479; Gordon v. Checker Taxi Cab Company, 334 Ill. App. 313, at page 321.

Because of the ruling on this, the matter of the instructions complained of will not be considered but the judgments will be reversed and the cause remanded for a new trial.

Reversed and remanded.

~~To be published in abstract only.~~

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Because of the ruling on this, the matter of the instructions complained of will not be considered but the judgments will be reversed and the cause remanded for a new trial.

Reversed and remanded.

~~Re-argument denied in October term.~~

217 A

45967

350 I.A. 502

CHARLES PATRICK BROWNING, Appellee,	)	
	)	APPEAL FROM SUPERIOR
v.	)	
	)	COURT, COOK COUNTY.
ALICE CROLLEY BROWNING, Appellant.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a petition to vacate a decree for divorce. The parties were married June 21, 1935, and no children were born of the marriage. Appellee, the husband, filed his suit for divorce March 30, 1949, charging desertion and cruelty. Appellant, the wife, filed an answer denying the charges. On May 2, 1949 she filed a counterclaim for enforcement of a separation agreement, and issue was joined thereon. Thereafter, the wife amended her counterclaim to one for divorce. On December 10, 1951 the case was tried upon the amended counterclaim and answer thereto. A decree was entered February 27, 1952, granting a divorce and awarding to the wife, pursuant to an agreement settling property rights between the parties, the sum of $2500 upon signing the decree and $100 per month thereafter as permanent alimony. On March 27, 1952, the wife filed a petition to vacate the decree and on May 21, 1952 filed an amendment to that petition. The husband filed an answer, and on June 13, 1952 the court, after hearing, entered a final order denying the petition as amended.

The substance of the petition is that pressure

was exerted upon the wife at the time of the trial of the divorce suit, both by her own attorney and by the attorney for her husband; that she suffered supposed impairment of her faculty of comprehension; that the decree for divorce provided less for her support than the separation agreement which the parties had previously made; that prior to the decree the wife's attorney appeared and objected to its entry; that the decree was not entered on the motion of the wife; and that she did not authorize it, together with other charges, the substance of which is that the wife did not know what she was doing when she appeared as a witness at her own divorce suit and produced her daughter by a former marriage to support her in the presentation of that case.

It appears that the wife is a school teacher, a graduate of Columbia University and the University of Chicago, and that she earns $550 per month; that she owns property acquired before her marriage; and that the husband released all interest therein. According to her contention, her husband earns $15,000 a year, although it is asserted that the parties came to an understanding that he was earning $9800 a year. At the time of the trial of the divorce case, the wife testified that her husband was at times very cruel to her, and then testified to certain specific acts of cruelty. She was asked by her counsel whether, in the

event the court granted her a decree of divorce, she had agreed to accept the sum of $2500 to be paid to her instanter and permanent support of $100 per month, in addition to what she was earning as a school teacher. She answered affirmatively. She was then asked, "Your husband has indicated that his income is $9000 or $10,000 a year net?" She answered yes to that, but added, "I would say he makes $15,000 or more altogether." She was also questioned concerning an agreement with respect to debts which she had incurred and answered that these were incurred "since the separation so I will pay them." On cross-examination, she was again asked whether the agreement that $2500 be paid her "upon the entry of a decree for divorce," and the payment of $100 per month was satisfactory to her. She hesitated and then, in response to the court's insistence, answered "Yes, sir." Her daughter was produced as a witness and testified in her mother's behalf. Upon the trial of the petition to vacate the decree, the daughter testified as follows:

> "Q. Your mother has always been above average intelligence, with superior mentality?
>
> "A. Yes.
>
> "Q. During her 16 or 17 years of teaching in the public schools in the City of Chicago she has always received a superior rating as a school teacher?
>
> "A. Yes.
>
> "* * *

"Q. Did you think it [the hearing on the complaint for divorce] was for separate maintenance or divorce?

"A. I knew it was for divorce.

"Q. You knew that it was for divorce and you talked that over with your mother, didn't you?

"A. Yes."

Having gone through the abstracts and the record, we are of the opinion that there is not the least doubt that the wife knew what she was doing at the time of the trial of the divorce case, when the agreement was made with respect to payments to be made to her, and at the time the decree was entered. During the course of the proceedings, the trial court several times said that his court was not to be used for bargaining purposes; that he did not understand that there was any question about whether divorce or separate maintenance was involved, but what was involved was the amount of money plaintiff was to receive, and her lawyer agreed that this was so. It is also our conclusion from a reading of the record that the real objective of the wife is not the maintenance or revival of the marriage bond, but a resumption of negotiations for a more favorable settlement of property rights.

The wife argues that when new counsel retained by her appeared at the January 31, 1952 hearing and stated his objection to the entry of the decree, the court was thereupon without authority to enter such decree, even though other counsel had consented to it. A portion of

her counsel's argument was devoted to the amount of payments to be provided for in the decree. No motion was made to withdraw the counterclaim or to dismiss the suit or to change the same. Thus, the court was in the position of having before him a suit in which the issue had been made and the matter tried and awaiting decree. The policy of the state strongly favors maintenance of the marital relationship, and courts have sustained motions to dismiss or withdraw a complaint for divorce after trial. But here, there was no such motion. An entirely different situation is presented where a party uses the period between the time of trial of a divorce suit and the preparation and execution of the decree to press for larger payments than the sum agreed upon by way of property settlement at the time of the hearing.

Argument is also made by counsel that the decree should have been written up by the wife's attorney. The decree is the court's decree. While the cases reveal that it is the practice for the attorney for the party in whose favor the decree is presented to first present a draft to the court, that is of no consequence. The question before us is whether the court properly entered the decree. Plaintiff cites many cases condemning the practice of negotiations for a divorce, and we concur in that condemnation. However, where the facts of the divorce already exist, an adjustment of property rights of the parties by agreement is

desirable. It is not charged that there was collusion with respect to obtaining grounds for a divorce. There is no public interest involved in setting aside this decree in order that the wife may continue to exert her efforts to obtain more than was agreed to at the time of the divorce hearing.

Motion has been made for dismissal of the appeal on the ground that there has been a release of errors. It appears that subsequent to the taking of the appeal, the wife cashed the check for $2500 and that three checks for $100 each, of the monthly payments which the husband agreed to make to her, were also cashed. There is some explanation of this on the part of the wife's present attorney, the last of a line of six or seven who appeared on her behalf. He says it was necessary to cash the $2500 check and two $100 checks in order that a deposit might be made with a surety company to indemnify it for appearing on the appeal bond. The third $100 check was endorsed to and cashed by the wife's present attorney. It is difficult for us to understand this explanation, and we think there is merit in the motion of the husband, which is in the nature of a plea of release of errors, but we have preferred to discuss and decide the case on its merits. That motion is, therefore denied.

It is urged upon us that there is only a partial report of proceedings before the court and that we

must, therefore, assume that sufficient evidence was presented to the chancellor to sustain the order. There is no record of the proceedings before the court at the hearings of February 4th and February 27, 1952. The authorities sustain the proposition. Anthony v. Gilbrath, 396 Ill. 126; Sheean v. Beil, 300 Ill. App. 364. However, there is sufficient evidence in that part of the record presented to us to sustain the order. On the hearing of the petition, the trial court was in the best position to judge of the question of fact, and his order should not be reversed unless it is against the manifest weight of the evidence. Cohn v. Cohn, 327 Ill. App. 22; Andrews v. Matthewson, 332 Ill. App. 325; Marcy v. Marcy, 400 Ill. 152.

Order affirmed.

Robson, P. J., and Tuohy, J., concur.

218 A

45959

PEOPLE OF THE STATE OF ILLINOIS, ex rel. EUSEBIUS J. BIGGS, Appellant,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
JAY A. SCHILLER, Judge of the Municipal Court of Chicago, Appellee.	)	

350 I.A. 502

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a petition for a writ of mandamus against the defendant in the Superior Court of Cook County. From an order dismissing the petition plaintiff appeals.

Summarized, the petition alleges that subsequent to a verdict for defendant in a suit in the Municipal Court of Chicago in which petitioner was plaintiff, suing as assignee, a motion for new trial was filed. The original cause was tried March 5, 1952, and the motion for new trial was filed March 28, 1952. The petition alleges that when the motion was presented respondent, sitting as judge, said that the motion was "of course denied--there is no order at all, nothing before the court." Plaintiff complains that he was thereafter arbitrarily denied leave to argue the motion and prays that the writ of mandamus direct defendant "to vacate any and all orders given by him" in the case in the Municipal Court of Chicago and that defendant "be directed to listen to the arguments of this petitioner on any and all legal matters this petitioner may bring

before him."

On its face the petition is wholly insufficient to justify the issuance of the writ of mandamus. The order of the Superior Court of Cook County is affirmed.

Order affirmed.

Robson, P. J., and Schwartz, J., concur.

219 A

45971

350 I.A. 503

In the matter of the estate of DORA NEUHAUSER, Deceased.	)	
LOUIS J. MARK, Conservator of the estate of HILDA MAZER, Incompetent, Appellee,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	)	
FERDINAND J. KARASEK, Appellant.	)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Ferdinand J. Karasek, appellant here, was on July 12, 1949, by order entered in the Probate Court of Cook County directed to deliver forthwith to the conservator of the estate of Hilda Mazer certain securities (not here involved), and to pay over the sum of $729.31. The securities and cash had come into the hands of Karasek as administrator and attorney for the administrator in an estate in which Hilda Mazer was legatee. There was an appeal to the Circuit Court and on November 9, 1950, on a trial before the court without a jury, the order of the Probate Court directing payment of the sum of $729.31 was affirmed. The securities had been turned over by Karasek to the conservator prior to the trial in the Circuit Court.

On June 17, 1952, leave was given Karasek to file instanter a petition to vacate the judgment order entered on November 9, 1950. The petition was in the nature of

a writ of coram nobis and alleged substantially that one Lloyd Beaversdorf, a resident of Detroit, Michigan, "who would have testified if called as a witness" that the securities which Karasek was directed to turn over had been delivered to him by Hilda Mazer prior to her adjudication of incompetency. The answer to this petition alleges that at the Circuit Court hearing Karasek admitted the conversion in open court and pleaded for time to make restitution and to procure funds from an alleged accomplice in the state prison at Jackson, Michigan; that the petitioner then consented to the entry of the judgment, threw himself on the mercy of the court, pleading old age, infirmity and confusion, and that he had been let down by his accomplice Lloyd Beaversdorf.

The hearing on this petition and answer was set for June 24, 1952. It was later continued to July 1, 1952. On June 27th notice was filed that a dedimus would be sued out to take the testimony of Lloyd Beaversdorf in Detroit, Michigan, on July 15, 1952. When the matter was called for hearing on July 1, 1952 the trial court refused any further continuance, and it is complained here that the failure to continue the cause to await the deposition of Beaversdorf was an abuse of discretion.

The petition in the nature of a writ of coram nobis

was filed and heard before the same trial judge who was present at the time the original judgment was entered. He was acquainted with the facts set forth in the petition, the affidavits filed in support thereof and in the answer to the petition. If the matters set forth in the answer are true, and the trial judge was in the best position to determine that fact, the attempt to file the Beaversdorf deposition was a highly improper procedure. Furthermore, Beaversdorf allegedly was alive prior to the time of the original cause and if there was any merit in the defense the evidence sought to be introduced in the coram nobis proceeding was available then. Petitioner waited until after a second hearing date was set on the petition and answer before suing out a dedimus. There was no abuse of discretion on the part of the court in refusing to permit further delay. Every consideration by way of continuance and by way of leniency had been extended to the appellant herein. The appeal is utterly without merit.

The order of the Circuit Court of Cook County denying the motion to vacate the judgment order of November 9, 1950 is affirmed.

Order affirmed.

Robson, P. J., and Schwartz, J., concur.

350 I.A. 504

45993

MARION STOUT HARGROVE, Administratrix of the estate of OTHO HARRY HARGRAVE, Deceased,	)	
Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
	)	COOK COUNTY.
ILLINOIS CENTRAL RAILROAD COMPANY, an Illinois Corporation, and MICHAEL O'MALLEY,	)	
Appellees.	)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, administratrix of the estate of Otho Harry Hargrove, sued defendants for damages for the wrongful death of her intestate husband in Chicago, Illinois, on November 19, 1948, occasioned as a result of his being struck by defendant railroad company's train, operated by its employee, defendant O'Malley. At the conclusion of plaintiff's case the court directed a verdict for defendants, from which this appeal is taken.

Occurrence witnesses were defendant O'Malley and Robert Lipsky, both of whom testified to material facts immediately preceding the accident, though neither actually saw the train strike Hargrove. The testimony tends to prove that Hargrove left his residence approximately a block south of the scene of the accident, walking his dog on a leash, about 12:30 a.m. He arrived at the intersection of Ridgeland avenue, a north and south street, and the railroad tracks, which run down the

center of 71st street, an east and west street, a few minutes later. There are two sets of tracks, one for eastbound and one for westbound suburban trains, extending a number of blocks east and west of Ridgeland avenue. There are approximately ten to twelve feet between the inside rails of the two tracks on the right of way. There is a clear view from Ridgeland avenue up and down the right of way for a number of blocks in each direction. The crossing is guarded by gates controlled from a tower located a few feet east of the walk which crosses the tracks on the east side of Ridgeland avenue from the north to the south portions of the 71st street roadway. Before the accident the gates had been down at the Ridgeland avenue crossing for a couple of minutes because of the approach, not only of the eastbound train which struck decedent, but also because of the approach of a westbound train which crossed Ridgeland avenue prior to the accident and proceeded on, entering Stony Island station three blocks west of Ridgeland avenue just as the train involved in the accident was leaving Stony Island. As the eastbound train approached Ridgeland the red lights on the lowered gates were burning. It was a clear moonlit night; the weather was pleasant. The bells on the crossing gates at Ridgeland were ringing, as they had rung during the passage of the westbound train through the Ridgeland intersection. The bell on the eastbound train was also ringing at and immediately prior

to its entering the Ridgeland crossing. Defendant O'Malley testified that he saw decedent standing in the space between the east and west bound tracks, six feet north of the north rail of the east bound track, when the train was a block and a half away, and that decedent remained standing in that position when O'Malley last saw him when the train was fourteen feet away. At this fourteen foot distance O'Malley lost sight of decedent because the front end of the train which he was operating reached a point where O'Malley's view from the cab was obscured, and to use the motorman's language, "I was shadowed out of sight." The inference from this testimony is ineluctable that had decedent remained in this position he would not have been struck by the train.

The witness Lipsky was standing on 71st street where he observed the decedent just prior to the time of the accident, and he substantially corroborates the motorman as to the position of the decedent between the tracks. He did not actually see the train strike the decedent. The motorman became aware of the accident by virtue of what he described as a rustling noise in the lefthand corner of the cowcatcher, applied his emergency brake, and came to a stop four car lengths beyond. He found decedent's body lying close to the control tower.

Plaintiff argues that under these facts a question was raised for the jury as to defendants' negligence

and decedent's contributory negligence. She argues that there was evidence to indicate that the gates were permitted to remain down at this crossing for a period of two minutes between the passage of the two trains and that such conduct raised a question of fact as to the railroad's negligence in having perilously trapped the decedent. We do not agree with this contention. The physical facts establish beyond dispute that if decedent wished to withdraw from the position where he found himself as the eastbound train approached he could have done so by merely stepping around the cross arm gates which extended over the crosswalk. It is also not controverted that had he remained in the position he was when the motorman last saw him he would not have been struck.

Plaintiff argues further that there was no evidence in the record that the headlight on the train was working properly and that there was evidence from which inference could be drawn that the headlight was inadequate. We find no evidence to support any such inference, and the burden of proving any such negligence was of course upon the plaintiff. On the contrary, the motorman testified that he had "running lights on that train that night"; that the headlight casts a beam ahead about five blocks, and that the dim one casts a light about three blocks; that the night in question he dimmed the light as he approached the other train coming into Stony Island and that he put on the bright light again as soon as

he left Stony Island avenue.

The argument is made that the bell on the gates, which the proof shows were in operation immediately before and at the time of the accident, was deceptively similar to the bell which was sounding on the locomotive at this time. This charge is based upon the following testimony of the witness Lipsky: "Were you able to distinguish clearly between the bells ringing on the gates and the bell on the train? (Answer) Yes, there is a difference, not in pitch but in the speed they ring those bells. It is noticeable"; and the testimony of the witness Baer: "I think there is a slight difference [between the bells on the gates and that on the train] I just don't recall, but I think."

This argument is without substantial merit. The Illinois statutes (Par. 59, Chap. 114, Ill. Rev. Stat. 1951) require that a bell or whistle be sounded by a train approaching a crossing. There is no dispute that the statute was complied with. There is no reasonable inference which could be drawn from any testimony in the record that decedent was confused by virtue of any negligence on the part of defendants in the operation of the warning signals.

A number of cases on both sides bearing upon the question of a railroad company's obligation in the operation of its trains and maintenance of its crossings and on the question of contributory negligence are cited

by each of the parties. There is no dispute in this case upon the legal questions involved, and consequently comment on the cases cited would be superfluous. The decision here, as in the trial court, must be based upon the undisputed facts. Viewed in the light most favorable to plaintiff and indulging all inferences in her favor, there is no evidence whatsoever of any negligence on the part of the defendants in the operation of defendant railroad company's train at and immediately prior to the time of the accident.

The judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.

223 A

46023

350 I.A. 588

MICHAEL SESSA, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
ROLAND OLSON, OAK REALTY CO., INC., a corporation; and JOSEPH M. WALSH and SYLVIA WALSH, his wife, Appellees.	)	OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on the finding of the court in favor of defendants in an action to recover damages resulting from the alleged failure of defendants Joseph M. Walsh and Sylvia Walsh, his wife, to purchase a house owned by plaintiff in accordance with the terms of a written contract.

October 13, 1951 the Walshes executed a written contract to purchase a house owned and occupied by plaintiff located at 11438 South Maplewood Avenue in the City of Chicago, Cook County, Illinois, for the sum of $16,500. Pursuant to the terms of the contract the Walshes deposited $500 with the Oak Realty Company, a corporation, as earnest money. The balance of the purchase price was to be paid within five days "after the title is shown to be good." The contract also contains a provision which reads, "This contract is contingent upon the closing of the present deal at 620 East 87th Street, Chicago, Illinois. If this deal is not closed on or before November 13, 1951 this contract

shall be declared null and void by either party by notice in writing to the other party and the earnest money is then to be returned to the purchaser herein." At the time the Walshes signed the contract here in question to purchase plaintiff's property they had executed another contract to sell the premises which they owned at 620 East 87th Street in the City of Chicago to one Stoddard.

October 30, 1951 the Walshes executed a deed conveying their property to Stoddard. This deed was delivered to a bank from which Stoddard obtained a loan secured by a mortgage on the premises conveyed by the Walshes to Stoddard. November 14, 1951, the Walshes, through their attorney, served notice on the plaintiff that the sale of their property to Stoddard was not closed on or before November 13, 1951 and, in accordance with the provisions of the contract, they declared it null and void.

Plaintiff contends that the transaction between the Walshes and Stoddard was closed on October 30th, the date of the deed, and therefore the Walshes could not declare their contract with plaintiff void on November 14, 1951. We think this contention is without merit. The evidence shows that the deed from the Walshes to Stoddard was delivered to the bank for the purpose of making a purchase money loan; that the certificate of acknowledgment on the deed from the Walshes to Stoddard was dated November 15, 1951, and that this date also appears on the bill of sale of certain property from the Walshes to Stoddard. We think

the evidence was sufficient to support a finding that the sale of the Walshes' property was consummated after November 13, 1951 and that the bank did not pay the Walshes the purchase money due them from Stoddard until November 17, 1951.

The provision of the contract here in controversy permitting either of the parties to declare it null and void is clear and unambiguous and must be construed according to the language used without any extrinsic evidence. There is evidence tending to show that the provision for the termination of the contract was inserted at the request of the plaintiff. Moreover, plaintiff failed to offer any proof tending to show that the Walshes were responsible for any delay in closing the deal with Stoddard.

The statement of claim charges that the defendants Roland Olson and Oak Realty Company, a corporation, "confederated and conspired" with the other defendants to find some pretext for withdrawing and avoiding their obligations under the contract. These allegations without supporting facts are conclusions. See Aaron v. Dausch, 313 Ill. App. 524.

After careful examination of the record we think the evidence was ample to support the findings of the trial court.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG AND KILEY, JJ., CONCUR.

3587 A

Abstract

General No. 10619 Agenda No. 17

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT 350 I.A. 589

- - -

February Term, A. D. 1953

JEANETTE MARTIN, Plaintiff-Appellee, vs. CENTRAL ENGINEERING COMPANY, a Corporation, Defendant-Appellant.	Appeal from the Circuit Court of Rock Island County.

Dove, P. J.

The Defendant Central Engineering Company, a corporation, appeals from a judgment entered against it in the Circuit Court of Rock Island County in the sum of $32,500.00 and in favor of the plaintiff, Jeanette Martin. This judgment arises out of an automobile collision on October 21, 1948, between a car owned by the defendant Margaret Musfeldt in which plaintiff was riding as a guest and a car driven by defendant Anson O'Brien. The collision between these two automobiles occurred on a concrete pavement which had been constructed by the defendant Central Engineering Company. This is the third case that has reached this court arising out of this same accident. The other two cases are O'Brien v. Musfeldt, 345 Ill. App. 12, and Ohlweiler v. Central Engineering Company, 348 Ill. App. 246. In the O'Brien-Musfeldt case we sustained judgments against the defendant, Central Engineering Company, in favor of Anson O'Brien for $6,000.00, in

Abstract

General No. 18619 Number 10. 17

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

February Term, A. D. 1953

JUNETTE MARTIN, Plaintiff-Appellee, vs. CENTRAL ENGINEERING COMPANY, a Corporation, Defendant-Appellant.	Appeal from the Circuit Court of Rock Island County.

Dove, P. J.

The defendant Central Engineering Company, a corporation, appeals from a judgment entered against it in the Circuit Court of Rock Island County in the sum of $30,000.00 and in favor of the plaintiff, Junette Martin. This judgment arises out of an automobile collision on October 21, 1949, between a car owned by the defendant employer and which plaintiff was riding as a guest and a car driven by defendant Anson O'Brien. The collision between these two automobiles occurred on a concrete pavement which had been constructed by the defendant Central Engineering Company. This is the third case that has reached this court arising out of this same accident. The other two cases are O'Brien v. Martin, 348 Ill. App. 18, and Chiwaller v. Central Engineering Company, 348 Ill. App. 240. In the O'Brien-Martin case we sustained judgments against the defendant, Central Engineering Company, in favor of Anson O'Brien for $8,000.00, in

favor of Barbara O'Brien for $4,000.00, and in favor of Margaret Musfeldt for $25,000.00. In the Ohlweiler case we reversed a judgment of not guilty against the defendant, Central Engineering Company, and remanded the cause for a new trial, chiefly because of errors in the giving or refusing of instructions. In this case we also affirmed judgments of not guilty in favor of defendants Anson O'Brien and Margaret Musfeldt, who were jointly sued along with Central Engineering Company.

Count one of the instant complaint was directed against the defendant, Central Engineering Company, and charged it with nine specific acts of negligence or omissions. The essence of her charges was that this defendant failed to erect or maintain adequate warning signs, lights, flags, or other suitable devices to apprize travelers that all four lanes of the highway in question were open to traffic. Count two of this complaint charged the defendant Anson O'Brien, in substance, with operating his car in the wrong traffic lane and with failing to keep a proper lookout for other traffic on the highway. Count three was against Margaret Musfeldt, in whose car plaintiff was riding as a guest, and by it the plaintiff charged this defendant with wilful and wanton misconduct in failing to turn her car out of the path of an oncoming vehicle. The case was tried on all three counts of the complaint, and at the close of the plaintiff's evidence, the court reserved its ruling for an instructed verdict on behalf of defendant, Margaret Musfeldt. No evidence was offered on behalf of this defendant, and at the conclusion of all the evidence the jury returned a verdict finding her not guilty in obedience to the court's instruction and returned a verdict finding the defendant Anson O'Brien not guilty. As to the defendant, Central Engineering Company, the jury found this defendant

favor of Barbara O'Brien for $4,000.00, and in favor of Margaret Marshall for $2,000.00. In the Minister case we reversed a judgment of not guilty against the defendant, Central Engineering Company, and remanded the cause for a new trial, solely because of error in the giving or refusing of instructions. In this case we also affirmed judgments of not guilty in favor of defendants Susan O'Brien and Margaret Duelfish, who were jointly sued along with Central Engineering Company.

Count one of the instant complaint was directed against the defendant, Central Engineering Company, and charged it with nine specific acts of negligence or omissions. The reasons of her charges was that this defendant failed to erect or maintain adequate warning signs, lights, flags, or other suitable devices to inform travelers that all four lanes of the highway in question were open to traffic. Count two of this complaint charged the defendant Susan O'Brien, in substance, with operating her car in the wrong traffic lane and with failing to keep a proper lookout for other traffic on the highway. Count three was against Margaret Duelfish, in whose car plaintiff was riding as a guest, and by it the plaintiff charged this defendant with willful and wanton misconduct in failing to turn her car out of the path of an oncoming vehicle. The case was tried on all three counts of the complaint, and at the close of the plaintiff's evidence, the court received the ruling for an instructed verdict on behalf of defendant, Margaret Duelfish. No evidence was offered on behalf of this defendant, and at the conclusion of all the evidence the jury returned a verdict finding her not guilty in obedience to the court's instruction and returned a verdict finding the defendant Susan O'Brien not guilty. As to the defendant, Central Engineering Company, the jury found

guilty and assessed the damages of the plaintiff at $40,000.00. The trial court overruled this defendant's motions for a new trial and for judgment notwithstanding the verdict but ordered a remittitur in the sum of $7,500.00, which remittitur was agreed to and judgment was entered in favor of the plaintiff and against this defendant for $32,500.00. To reverse this judgment defendant, Central Engineering Company, appeals.

The principal errors relied on for reversal in this appeal are: (1) that the verdict is contrary to the manifest weight of the evidence; (2) that the court erred in denying the defendant's motion for a severance; (3) that the court erred in not granting a new trial because of improper conduct on the part of plaintiff's counsel and because of excessive damages; (4) the court erred in refusing to strike certain testimony pertaining to the condition of the plaintiff's eye; and (5) the court erred in refusing to give certain instructions on behalf of the defendant.

Jeanette Martin, the plaintiff here, is referred to in the opinion in Ohlweiler v. Central Engineering Co., 348 Ill. App. 246, at page 251, as Miss Martin, and she and Orpha Ohlweiler were riding in the rear seat of a Ford automobile driven by Margaret Musfeldt at the time and upon the occasion in question. The car in which she was a passenger was proceeding north, on a new four-lane concrete pavement which had been constructed by the Central Engineering Company on a straight, level, north-south portion of U.S. Highway 67 between its intersection with two east-west highways known as the Airport Road and the Andalusia Road. At the north end of the new pavement there was a two-laned "Y" which branched off into the Airport Road. The new four-lane

pavement commenced at the base of the "Y" at Second Avenue about a block south of the Airport Road and extended south for about 2000 feet to a point where the two east lanes and the two west lanes were divided by a raised parkway and then continued south as a divided parkway for about 1400 feet to the Andalusia intersection. The road then continued in a southerly direction for about 3.6 miles to another intersection known as Castle Junction, which is located near a Church Camp Ground. This highway between the Airport Road on the north and Castle Junction on the south had formerly been a two-lane highway, and at the time of this accident it was being changed by the defendant, under a contract with the State of Illinois, from a two-lane highway to a four-lane highway. At the time of the collision only two lanes of Route 67 were open to travel south of the Andalusia Intersection. This was also true of 1400 feet of the pavement north of the Andalusia Intersection to the end of a raised parkway or island dividing the two avenues of the four-lane pavement into north and south traffic lanes. There was a four-foot, black, median strip dividing the two avenues on this highway extending from the north end of the parkway or island to the north end of the project. Traffic reaching the north end of the raised parkway was expected to turn to the right and cross over the median strip in order to get onto the other half of the roadway. North-bound traffic was supposed to use the east lane of the two-lane stretch of highway until it reached the place where it was supposed to turn to the right and use the east half of the highway. The collision occurred about 1100 feet north of the north end of the parkway in the easterly of the two western lanes. The Anson O'Brien car was proceeding south behind a truck. The driver turned into the inner lane to pass this truck. Miss Musfeldt,

pavement commenced at the base of the "Y" at Second Avenue about a block south of the Airport Road and extended south for about 2000 feet to a point where the two east lanes and the two west lanes were divided by a raised parkway and then continued south as a divided parkway for about 1400 feet to the Ardsley Interseection. The road then continued in a southerly direction for about 3.6 miles to another intersection known as Castle Junction, which is located near a Church Zion Ground. This highway between the Airport Road on the North and Castle Junction on the South had formerly been a two-lane highway, and at the time of this accident it was being changed in the interest, under a contract with the State of Illinois, from a two-lane highway to a four-lane highway. At the time of the collision only two lanes of South 27 were open to travel south of the Ardsley Intersection. This was also true in 1400 feet of the pavement north of the Ardsley Intersection to the end of a raised parkway or island dividing the two roadways of the four-lane pavement into north and south traffic lanes. There was a four-foot, black, radian strip dividing the two roadways on this highway extending from the north end of the parkway or island to the north end of the project. Traffic preceding the north end of the raised parkway was expected to turn to the right and cross over the median strip in order to get onto the other half of the roadway. North-bound traffic was supposed to use the east lane of the two-lane stretch of highway until it reached the place where it was supposed to turn to the right and use the east half of the highway. The collision occurred about 1100 feet north of the north end of the parkway in the easterly of the two western lanes. The Dixon O'Brien car was proceeding south behind a truck. The driver turned into the inner lane to pass this truck. Miss Duffelt,

in whose car plaintiff was riding as a passenger in the rear seat, was north bound in the lane in which the O'Brien car was attempting to pass the truck. The two cars collided, and plaintiff suffered serious injuries as a result thereof.

The evidence shows that there was no sign or signal near the point where the collision occurred to direct north bound traffic to cross over to the right to avoid south bound traffic. The defendant, Central Engineering Company owned and maintained a barricade, a "slow" sign, and a flare some twenty-five to forty feet north of the north end of the parkway, which indicated that the east half of the roadway was closed, when, as a matter of fact, it was open and was the half of the highway which the Musfeldt car should have taken. A number of witnesses testified that there were no signs, arrows, or other traffic directional devices indicating that the traffic, after having passed the north end of the parkway, was to turn over into the two east lanes. The testimony in this record concerning the construction of this highway and the signs and signals and other directional devices along and upon the highway near the point where the collision occurred is voluminous, and there are a number of photographs, charts, and maps in the record which portray the scene of the accident and the highway in both directions therefrom. We have read the evidence carefully and have studied the maps and charts and have reached the conclusion that the verdict of the jury with reference to the negligence of this defendant is not contrary to the manifest weight of the evidence. The defendant claims that there was no duty resting upon it under the circumstances of this case to erect signs. This, however, is a question of fact and also one of law. We think the evidence clearly shows that it was its duty and,

in whose car plaintiff was riding as a passenger in the rear seat, was north bound in the lane in which the O'Brien car was attempting to pass the truck. The two cars collided, and plaintiff suffered serious injuries as a result thereof.

The evidence shows that there was no sign or signal near the point where the collision occurred to direct north bound traffic to cross over to the right to avoid south bound traffic. The defendant, Central Engineering Company owned and maintained a barricade, a "slow" sign, and a flare some twenty-five to forty feet north of the north end of the railway, which indicated that the west half of the roadway was closed, when, at a matter of fact, it was open and was the half of the highway which the motorist car should have taken. A number of witnesses testified that there were no signs, arrows, or other traffic directional devices indicating that the traffic, after having passed the north end of the railway, was to turn over into the two east lanes. The testimony in this record concerning the construction of this highway and the signs and signals and other directional devices along and upon the highway near the point where the collision occurred is voluminous, and there are a number of photographs, charts, and maps in the record which pictury the scene of the accident and the highway in both directions therefrom. We have read the evidence carefully and have studied the maps and charts and have reached the conclusion that the verdict of the jury with reference to the negligence of this defendant is not contrary to the manifest weight of the evidence. The defendant claims that there was no duty resting upon it under the circumstances of this case to erect signs. This, however, is a question of fact and also one of law. We think the evidence clearly shows that it was its duty and

further, that it neglected the duty which the law imposes upon it, as the jury found. (O'Brien v. Musfeldt, 345 Ill. App. 12; Hallett v. William Eisenberg & Sons, 116 N.J.L. 201, 183 Atl. 143; Ohlweiler v. Central Engineering Company, 348 Ill. App. 246; Kehms v. Dilts, 222 Ia. 826, 270 N.W. 388.)

In O'Brien v. Musfeldt, 345 Ill. App. 12, the defendant~~s~~ here was a defendant in that case, and it filed a motion for a separate trial, which motion was overruled. This was assigned as error on appeal, and in disposing of this contention we said: "Before the case was submitted for trial, the defendant filed a motion for separate trial claiming that it would be prejudiced by trying the three cases at one time, because the issues were so numerous and complicated that it would be difficult for the jury to understand the evidence as to each separate claim, and therefore the defendant would be unduly prejudiced. The appellant concedes that in the matter of granting a separate trial, it is within the discretion of the trial court and cannot be complained of, unless there has been an abuse of that discretion. In this particular case it was one accident and the same evidence would necessarily have to be introduced in each particular case if the court had granted a severance, so under the circumstances as disclosed in this case we are of the opinion that the court did not err in refusing to grant separate trials of each case." It is our opinion that the same situation is substantially present in this case, and we adhere to our decision that the trial court committed no error in denying the motion for a severance. It will be recalled that in Ohlweiler v. Central Engineering Company, 348 Ill. App. 246, the same situation was present with reference to the number of

further, that it neglected the duty which the law imposes upon it, as the jury found. (O'Brien v. Sartelle, 248 Ill. App. 12; Hallett v. William Blumberg & Sons, 115 N.Y.S. 901, 125 Atl. 142; Ohlweiler v. Central Engineering Company, 248 Ill. App. 246; Adams v. Smith, 282 Ia. 829, 177 N.W. 388.)

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defendants in the case and the issues to be tried as is present here, and the jury in that case returned a verdict finding the defendant, Central Engineering Company, not guilty. The defendant was not prejudiced by a joint trial in that case, and it is difficult to see how it was prejudiced here.

Next, it is asserted that there was misconduct on the part of counsel for plaintiff during the trial. The misconduct charged consisted of asking certain questions with reference to the provisions of a contract between the plaintiff and the State of Illinois and of making certain remarks to witnesses. We have studied the record pertaining to the charges made against plaintiff's counsel and, while his demeanor and tactics are subject to censure, we are of the opinion that his behavior was not sufficiently prejudicial to the defendant to justify us in reversing this judgment. In nearly every instance complained of, the trial court admonished the jury to disregard the remarks of counsel, and, in this instance, we believe that this was sufficient to remove any prejudice which might have been created by counsel's conduct.

At the time of the trial, plaintiff had lost the sight in her left eye. The cornea of her eye was injured in the accident and her eye lid was cut. Surgery was performed on her eye on at least two occasions, and a number of doctors treated her for the injury which she sustained to her eye. Defendant, however, asserts that the trial court committed error in permitting certain evidence to be introduced relative to losing the sight in her eye for the reason that there was no causal connection between the injuries sustained by her eye in the

defendants in the case and the issues to be tried as it present here, and the jury in that case rendered a verdict finding the defendant, General Engineering Company, not guilty. The defendant was not represented by a joint trial in that case, and it is difficult to see how it was prejudiced here.

Next, it is asserted that there was misconduct on the part of counsel for plaintiff during the trial. The misconduct charged consisted of asking certain questions with reference to the provisions of a contract between the plaintiff and the State of Illinois and of making certain remarks to witnesses. We have studied the record pertaining to the charges made against plaintiff's counsel and, while his demeanor and tactics are subject to censure, we are of the opinion that his behavior was not sufficiently prejudicial to the defendant to justify us in reversing this judgment. In nearly every instance complained of, the trial court admonished the jury to disregard the remarks of counsel, and, in this instance, we believe that this was sufficient to remove any prejudice which might have been created by counsel's conduct.

At the time of the trial, plaintiff was just two years in her left eye. The cornea of her eye was injured in the accident and her eye life was out. Surgery was performed on her eye on at least two occasions, and a number of doctors treated her for the injury which she sustained in her eye. Defendant, however, asserts that the trial court committed error in permitting certain evidence to be introduced relative to losing the right in her eye for the reason that there was no causal connection between the injuries sustained by her eye in the

accident and the subsequent loss of the sight thereof. Plaintiff testified that she did not suffer any injury to her eye other than that sustained in the accident. There was no suggestion of any other accident which had intervened between the time of this collision and the time that Dr. Herzog treated plaintiff in July of 1949. He testified that all of the difficulties with her eye resulted from the condition which he observed on October 26, 1948, five days after the accident in question. One doctor did testify that he was unable to say that plaintiff's blindness definitely resulted from the injury which she sustained to her eye in the accident. It seems to us that taking the testimony as a whole with reference to the injury to plaintiff's eye there is a very decided connection between the injury to it and the subsequent loss of sight. Immediately after the accident there was a marked hemorrhage below the white of the eye. Five days later Dr. Herzog examined her and found that the cornea was cut and there were scratches on the eye ball. In July of 1949, when Dr. Herzog examined her again, the eye was hemorraging again and the cornea had broken up once more and the eye was badly inflamed. There is no contrary evidence. We think the element of causation between the accident and the injuries sustained is sufficiently established by the evidence.

The defendant contends that the court erred in its refusal to give certain instructions which it tendered. One of the instructions complained of is Instruction No. 32, which is as follows: "The court instructs the jury that a contractor cannot be held responsible for defects in the design or plan for the work performed by him; if you find from a preponderance of all the evidence in the case that the injuries, if any, sustained by the plaintiff were caused proximately and solely by confusion

accident and the subsequent loss of the right therefor. Plaintiff testified that she did not suffer any injury to her eye other than that sustained in the accident. There was no suggestion of any other accident which had intervened between the time of this collision and the time that Dr. Herzog treated plaintiff in July of 1940. He testified that all of the difficulties with her eye resulted from the condition which he observed on October 26, 1939, five days after the accident in question. The latter fact is really that on see unable to say that plaintiff's blindness definitely resulted from the injury which she sustained to her eye in the accident. It seems to me that taking the testimony as a whole with reference to the injury to plaintiff's eye there is a very decided connection between the injury to it and the subsequent loss of sight. Immediately after the accident there was a marked hemorrhage below the white of the eye. Five days later Dr. Herzog examined her and found that the cornea was cut and there were scratches on the eye ball. In July of 1940, when Dr. Herzog examined her again, the eye was hemorrhaging again and the cornea had broken up near the eye and badly inflamed. There is no contrary evidence. We think the element of causation between the accident and the injuries sustained is sufficiently established by the evidence.

The defendant contends that the court erred in its refusal to give certain instructions which it tendered. One of the instructions complained of is instruction No. 12, which is as follows: "The court instructs the jury that a corporation cannot be held responsible for defects in the design or plan for the work performed by him: If you find from a preponderance of all the evidence in the case that the injuries, if any, sustained by the plaintiff were caused proximately and solely by contusion

produced in the mind of the driver of the car in which she was riding, as a result of the appearance of the black median strip, that such appearance was inherent in the design or plan for said median strip and that said strip was constructed by the contractor in accordance with said design or plan or with standard construction practice, then you must find the defendants, Anson O'Brien and Central Engineering Company, not guilty." It will be observed this instruction included as an alternative proposition that it would be sufficient to release the defendant from liability if the median strip had been constructed according to "standard construction practice." This is not a correct statement of the law (Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399, 413). Since the instruction directed a verdict, each element contained therein must be a correct statement of the law. While proof of the customary practice of others in like occupations is competent evidence, it is not necessarily controlling on the issue of negligence (U.S. Radiator Corporation v. Henderson, 68 Fed. (2d) 87; Wigmore on Evidence (2d) Vol. 1, Sec. 461). There was no error in refusing to give this instruction.

The court likewise refused to give Instruction No. 35, which was an instruction based on Section 29 of the Uniform Act Regulating Traffic on Highways. We have previously held in O'Brien v. Musfeldt, 345 Ill. App./12, and Ohlweiler v. Central Engineering Company, 348 Ill. App. 246, that this statutory section has reference to permanent highway markers. Hence, this instruction was properly refused.

Instruction No. 36 tendered by the defendant was also refused. This instruction referred to a contract between the State of Illinois and the defendant concerning the construction of the highway in question. During the trial the court had refused

produced in the mind of the driver of the car in which she was riding, as a result of the appearance of the black median strip, that such appearance was inherent in the design or plan for said median strip and that said strip was constructed by the contractor in accordance with said design or plan or with standard construction practice, then you must find the defendants, Anson D'Triam and Dertrel Engineering Company, not guilty." It will be observed this instruction included as an alternative proposition that it would be sufficient to release the defendant from liability if the median strip had been constructed according to "standard construction practice." This is not a correct statement of the law (Monsell-Hocco Foundry Co. v. Clark, 111 Ill. 590, 413). Since the instruction directed a verdict, each element contained therein must be a correct statement of the law. While proof of the customary practice of others in like occupations is competent evidence, it is not necessarily controlling on the issue of negligence (U.S. Radiator Corporation v. Bankerson, 66 Ill. App. (2d) 27; Wigmore on Evidence (2d) Vol. I, Sec. 461). There was no error in refusing to give this instruction.

The court likewise refused to give Instruction No. 36, which was an instruction based on Section 20 of the Uniform Act Regulating Traffic on Highways. We have previously held in D'Triam v. Dertrel, 346 Ill.App. 13, and Schweiler v. Central Engineering Company, 343 Ill. App. 246, that this statutory section has reference to ordinary highway markers. Hence, this instruction was properly refused.

Instruction No. 20 tendered by the defendant was also refused. This instruction referred to a contract between the State of Illinois and the defendant concerning the construction of the highway in question. During the trial the court had refused

to admit the contract in evidence, and since the contract was not in evidence, the instruction offered was improper and the court committed no error in refusing to give it.

Lastly, the defendant contends that the judgment awarded the plaintiff was grossly excessive. The plaintiff was fifty-five years of age and was employed by the Black Hawk Federal Savings and Loan Association in a secretarial capacity. She lost the sight of her left eye in this accident, and at the time of the trial this condition was still associated with pain. She suffered a comminuted fracture of the right leg, which resulted in a displacement of the bone for three-eights of an inch. This leg and foot were still swollen at the time of the trial, and there was considerable sensitivity over the scar left as a result of the fracture. She had no upward motion of the right foot, and the downward motion was limited to thirty degrees, whereas normal downward motion ranges from forty-five to sixty degrees. The bones in the left ankle and foot were broken in several places, and her left leg was in a cast for three months. There was considerable limitation of motion in this foot as a result of the injuries sustained. At the time of the trial she showed evidence of progressive traumatic arthritis. The limitation of motion in both her legs and feet is permanent. She also suffered a broken nose, and her left wrist was fractured. She suffered great shock as a result of the accident and numerous abrasions and contusions about her face and body. She was in the hospital the first time for four and one-half months. After leaving the hospital, she was confined to her home for three more months. She thereafter entered the hospital for short periods of time. Her total medical and hospital expenses were about $2900.00. It thus appears that plaintiff received very serious and permanent injuries and, while the judgment in her favor is large, we have reached the conclusion that it is within the limits which a jury

to admit the contract in evidence, and since the contract was not in evidence, the instruction offered was improper and the court committed no error in refusing to give it.

Lastly, the defendant contends that the judgment awarded the plaintiff was grossly excessive. The plaintiff was fifty-five years of age and was employed by the Texas Work Personal Savings and Loan Association in a secretarial capacity. She lost the sight of her left eye in this accident, and at the time of the trial this condition was still accompanied with pain. She suffered a comminuted fracture of the right leg, which resulted in a disfigurement of the bone for three-eighths of an inch. This leg and foot were still swollen at the time of the trial, and there was considerable sensitivity over the scar left as a result of the fracture. She had no spasmodic action of the right foot, but the downward motion was limited to thirty degrees, whereas normal downward motion ranges from forty-five to sixty degrees. The bones in the left ankle and foot were broken in several places, and her left leg was in a cast for three months. There was considerable limitation of motion in this foot as a result of the injuries sustained. At the time of the trial she showed evidence of progressive traumatic arthritis. The limitation of motion in both her legs and feet is permanent. She also suffered a broken nose, and her left ankle was fractured. She suffered great shock as a result of the accident and numerous abrasions and contusions about her face and body. She was in the hospital the first time for four and one-half months. After leaving the hospital, she was confined to her home for three more months. She thereafter entered the hospital for short periods of time. Her total medical and hospital expenses were about $[illegible].

It thus appears that plaintiff received very serious and permanent injuries and, while the judgment in her favor is large, we have reached the conclusion that it is within the limits which a jury

might reasonably return.

We have studied this record with care. The case was vigorously prosecuted and ably defended by experienced counsel. It is our conclusion that nothing transpired at the trial which prevented the defendant from receiving a fair trial or which would warrant a reversal of this judgment. The record is free from any error requiring a reversal and the judgment in favor of the plaintiff and against the Central Engineering Company must be affirmed.

Judgment affirmed.

3593

Abstract

General No. 10656 Agenda No. 20

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - - 350 I.A. 590

February Term, A.D. 1953

ROBERT V. DE MONT, As Administrator of the Estate of ROBERT LEON DE MONT, Deceased, Plaintiff-Appellee, vs. CLARENCE L. MERTES and BENJAMIN POLEN AND HARRY POLEN, a partnership, d/b/a Aurora Home Furnishing Company, Defendants-Appellants.	Appeal from the Circuit Court, Kane County.

Dove, P. J.

On August 29, 1950, the instant complaint was filed by the father of Robert Leon DeMont as administrator of the estate of his said son against Clarence L. Mertes, Benjamin Polen and Harry Polen seeking to recover damages for the alleged wrongful death of plaintiff's intestate.

The complaint, among other things, charged that the defendant, on August 20, 1950, negligently backed his car down a gravel private driveway leading to the residence of the plaintiff on the west side of Farnsworth Avenue in Aurora, Illinois, and that in so doing he failed to keep a reasonable lookout and failed to give any warning that he was backing his car, and averred that as a direct and proximate result of this negligence

Abstract

General No. 10886 Cong'l No. 22

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

February Term, A.D. 1952

ROBERT V. DE MONT, Administrator of the Estate of ROBERT LEON DE MONT, Deceased, Plaintiff-Appellee, va. CLARENCE L. WEBER and Fellows POLEN and HARRY POLEN, a partnership, doing Aurora Cab Running Company, Defendants-Appellants.	Appeal from the Circuit Court. Kane County.

Love, P. J.

On August 22, 1950, the instant complaint was filed by the father of Robert Leon Demont as administrator of the estate of his said son against Clarence L. Weber, Benjamin Polen and Harry Polen seeking to recover damages for the alleged wrongful death of plaintiff's intestate.

The complaint, among other things, charges that the defendant, on August 20, 1950, negligently backed his car down a gravel private driveway leading to the residence of the plaintiff on the west side of Farnsworth Avenue in Aurora, Illinois, and that in so doing he failed to keep a reasonable lookout and failed to give any warning that he was backing his car, and averred that as a direct and proximate result of this negligence

the decedent was run over by the automobile and received injuries from which he died. The complaint further alleged that plaintiff's intestate, a boy twenty months of age, left him surviving as his heirs at law and next of kin his mother, father, and a half-brother, and charged that upon the occasion in question, the defendant, Clarence L. Mertes, was an agent and servant of the defendants Benjamin and Harry Polen. The answer of the defendants denied all of the material allegations of the complaint, and the issues so made were submitted to a jury, resulting in a verdict in favor of the plaintiff and against the defendants for $5000.00 upon which the trial court, after overruling motions for a new trial and for judgment non obstante verdicto, rendered judgment ~~upon the verdict~~ and the defendants appeal.

It is insisted by counsel for the appellants that the verdict and judgment are contrary to the manifest weight of the evidence; that the court erred in the admission of evidence; that counsel for appellee made improper and prejudicial remarks during the course of the trial, and that the court erred in its refusal to give one instruction tendered by appellants.

The record discloses that on August 22, 1950, decedent, a boy twenty months of age, lived with his parents and half-brother in their home located on the west side of Farnsworth Avenue in Aurora, Illinois; that on and for five years prior to that date, Clarence L. Mertes, one of the defendants, was employed by the other defendants, Benjamin Polen and Harry Polen, a partnership, doing business as Aurora Home Furnishing Company, as a collector and distributor of merchandise. In connection with his work, Mr. Mertes was driving, on the morning in question,

the decedent was run over by the automobile and received injuries from which he died. The complaint further alleged that plaintiff's intestate, a boy twenty months of age, left his surviving as his heirs at law and next of kin his mother, father, and a half-brother, and charged that upon the occasion in question, the defendant, Clarence L. Mertes, was an agent and servant of the defendants Benjamin and Harry Polen. The answer of the defendants denied all of the material allegations of the complaint, and the issues so made were submitted to a jury, resulting in a verdict in favor of the plaintiff and against the defendants for $5000.00 upon which the trial court, after overruling motions for a new trial and for judgment non obstante veredicto, rendered judgment [illegible] and the defendants appeal.

It is insisted by counsel for the appellants that the verdict and judgment are contrary to the manifest weight of the evidence; that the court erred in the admission of evidence; that counsel for appellee made improper and prejudicial remarks during the course of the trial, and that the court erred in its refusal to give one instruction tendered by appellants.

The record discloses that on August 22, 1930, decedent, a boy twenty months of age, lived with his parents and half-brother in their home located on the west side of Farnsworth Avenue in Aurora, Illinois; that on and for five years prior to that date, Clarence L. Mertes, one of the defendants, was employed by the other defendants, Benjamin Polen and Harry Polen, a partnership, doing business as Aurora Home Furnishing Company, as a collector and distributor of merchandise. In connection with his work, Mr. Mertes was driving, on the morning in question,

a four-door 1946 Plymouth automobile in which various items of merchandise were lying flat on the back seat. He arrived at the DeMont residence between 11:30 and 11:45 in the morning of August 22, 1950, and turned off of Farnsworth Avenue into the private driveway and had proceeded about one hundred feet in the driveway when he stopped his car within one car length from the front edge of the DeMont house. This driveway ran west from the road to the house and had a border of white rocks. There was a picket fence surrounding the yard, except for the driveway, and a weeping willow tree was located inside the yard to the north of the driveway and west of the picket fence. When Mr. Mertes stopped his car he got out and went to the front door of the DeMont home and, in response to his knock, the half-brother of decedent, a boy aged ten, came to the door with the money for which Mr. Mertes had come to collect. Mr. Mertes testified that when he turned into the driveway upon his arrival at the DeMont home he observed decedent who was then walking, running and playing about the middle of the yard south of the driveway; that after he rapped on the front door he observed plaintiff's intestate coming toward him and he (Mertes) was playing with him when the older boy came to the door with the money; that after he had received and receipted for the money, he talked through the closed screen door with Mrs. DeMont for a few minutes and then returned to his car; that as he did so he looked across the yard and up and down the driveway but did not see the decedent, nor did he notice a child's stroller, painted blue, which decedent's mother testified was in the yard.

Appellant, Clarence L. Mertes, further testified that when he went back to his car the decedent was not in sight and

a four-door 1941 Plymouth automobile in which various items of merchandise were lying flat on the back seat. He arrived at the Patrick residence between 11:10 and 11:15 in the morning of August 20, 1950, and turned off of Tonawanda Avenue into the private driveway and he proceeded about one hundred feet in the driveway when he stopped his vehicle one car length from the front edge of the garage door. This driveway ran east from the west of the house and had a border of white stone. There was a picket fence surrounding the yard, except for the driveway, and a hedge which had formed inside the yard to the north of the driveway and west of the garage fence. Mr. Martin stopped his car, he got out and went to the front door of the house and, in response to his knock, the mid-twenties defendant, a boy aged ten, came to the door with his sister who was three and ran to Leland. Mr. Marks testified that when he turned into the driveway upon his arrival in the Patrick home he observed defendant and his sister playing, throwing and playing about the middle of the west side of the driveway; that after he walked on the front door he observed plaintiff's intestate sitting toward the rear (west) and playing with him when he place her back to the driveway; that after, he received and demanded for the money. He talked through the closed screen door with her. Upon her a few minutes and then returned to the car, then he did not be looked around the yard and to and from the driveway but did not see the defendant, nor did he notice a child's stroller, painted blue, which defendant's mother testified was in the yard.

Defendant, Clarence L. Martin, testified that when he went back to the car the defendant was not in sight and

that at no time after he left the porch of the DeMont home did he observe the child. He further testified that he entered his car, started the motor, looked down the driveway through the back window of the car and slowly started to back down the driveway; that when he looked through the rear window of the car there was a space close up to the rear of the car which he could not see. As abstracted, this witness then testified: "I put my arm on the back of my seat, raised up and looked out of the back of the window and I was moving slowly back and I moved a few feet, turned to see if I was in line with the stones and traveled on a few feet before changing my attention from the rear window to the front wheels. When I turned from looking out of the back window and glanced around the right front fender I seen the top of decedent's head -- near the front wheel -- out a little ways. He was moving towards the front of the car a little diagonally, like he was going to pass it. He was towards the front of the car. I was looking right over the fender. He had to be two or three feet from the car for me to see him. I just saw the top of his head. He went out of sight coming toward the car. I stopped immediately right there. When I saw the little head going past the top of the fender I stopped. I sat a second because I thought I would see him going toward the house. I did not see anything so I got out and went around the left front fender and there he was lying in the driveway. There was room to walk between him and the car. I would say he was three or four feet from the car. His head was west, his feet about twelve inches from the wheel tracks of the driveway. His right side was on a rock. The rock was between the bush and the trunk of the willow tree somewhere. When I got out of my car and went

that at no time after he left the porch of the Pendant house did he observe the child. He further testifies that he entered his car, started the motor, looked down the driveway through the back window of the car and slowly started to back down the driveway; then when he looked through the rear window of the car there was a blonde close up to the rear of the car which he could not see. As aforesaid, this witness then testified: "I put my foot on the brake of my car, backed up and looked out of the back of the window and I was moving slowly back and I swerved a few feet, turned to see if I was in line with the street and traveled on a few feet before changing my direction from the rear window to the front windows. When I turned from looking out of the back window and glanced through the right front window I saw the top of Beaumont's head -- that the front wheel -- out a little ways. He was moving towards the front of the car a little diagonally, like he was going to pass it. He was towards the front of the car. I was looking right over the fender. He had to be two or three feet from the car so he was big. I just saw the top of his head. He went out of sight behind towards the car. I stopped immediately right there. Then I saw the little head going past the top of the fender I stopped. I did a second because I thought I would hit him going toward the front. I did not see anything so I got out and went around the left front fender and there he was lying in the driveway. There was then no walk between the and the car. I would put he was three or four feet from the car. His head was west, his feet about twelve inches from the wheel tracks of the driveway. The right side was on a rock. The rock was between the road and the bushes or the willow trees somewhere. When I got out of my car and went

around I did not see the stroller. I picked up the child and called Mrs. DeMont. She met me on the south of the driveway. I said 'the boy has been hurt but I didn't run over him.' When I picked him up he was lying away from the car in front. I would not say -- I don't know whether I ran over him."

Mrs. DeMont testified that when Mr. Mertes left the house he bade her boodbye and "the next thing I knew he (Mertes) came to the door carrying the baby and said 'Mildred, I ran over your little boy.'"

Alice Hollman testified that upon the occasion in question she was visiting in the home next door to the DeMont home; that she went to the door of that home and observed the child's stroller in the yard but did not see the decedent until after the accident; that she saw Mr. Mertes come from the DeMont house and get into the automobile and later observed the car standing near the willow tree and saw Mr. Mertes running toward the DeMont home with the baby in his arms and heard Mr. Mertes say to Mrs. DeMont when she came to the door of her home, "Mildred, I run over your baby."

Donald White testified on behalf of the defendants that his home was next door to the DeMont home and upon the occasion in question he was back by the fence north and west of the willow tree fixing his bicycle; that he saw decedent before the accident in his stroller by the willow tree; that he observed the baby got out of the stroller and walked toward the driveway; that when Mr. Mertes started to back out of the driveway, he heard the brakes and looked up and saw Mr. Mertes get out of the car and pick up the baby near the driveway.

Counsel for appellants insist that the judgment is contrary to the manifest weight of the evidence and that

around I did not see the arrester. I picked up the child and called Mrs. Lebrun. She got me on the south of the driveway. I said 'Too by her mom dart but I didn't run over him.' Then I picked him up by the lying away from the car in front. I would not say -- I don't know whether I ran over him."

Mrs. Lebrun testified that when Mr. Mortes left the house he held her boy by the hand. During I saw a (inaudible) close to the door carrying the baby and held (Mildred), I ran over your little boy."

Alice Mullen testified that upon the occasion in question she was visiting in the home next door to the Demont home; that she went to the door of that home and observed the child's stroller in the yard but did not see the accident until after the accident; that she saw Mr. Mortes come from the DeMont house and get into the automobile and later observed the car standing near the willow tree and saw Mr. Mortes running toward the DeMont home with the baby in his arms and heard Mr. Mortes say to Mrs. Lebrun when she came to the door of her home, "Mildred, I run over your baby."

Donald Mills testified on behalf of the defendants that his home was next door to the Demont home and upon the occasion in question he was back by the fence north and west of the willow tree fixing his bicycle; that he saw defendant before the accident in his stroller by the willow tree; that he observed the baby get out of the stroller and walked toward the driveway; that when Mr. Mortes started to back out of the driveway, he heard the brake and looked up and saw Mr. Mortes get out of the car and pick up the baby near the driveway.

Counsel for appellants insist that the judgment is contrary to the manifest weight of the evidence and that

appellants' motion for judgment notwithstanding the verdict should have been sustained. The issues of fact made by the pleadings were submitted to a jury for determination. Whether appellant, Clarence L. Mertes, was guilty of the negligence charged and whether that negligence was the proximate cause of the death of decedent ~~was a~~ were questions of fact for the jury to determine. The observation of the several witnesses and the weight to be given the testimony of these witnesses are peculiarly within the province of the jury. This unfortunate accident occurred in a private driveway. The decedent was playing in his own yard. Mr. Mertes, when he entered this yard in his automobile, saw decedent and observed him shortly before he left the front door of the DeMont home. He had knowledge of his presence in the vicinity of the place where he subsequently picked him up. He knew his approximate age and that he was walking. After he returned to his car, this appellant looked through the back window and did not see the child, but according to his own testimony he was then wondering where the child was and for that reason was moving his car backward very slowly. As observed in Cambou v. Marty, 98 Cal. App. 598, 277 P. 365, 367, any reasonable man can be charged with knowledge that a child is apt to be found at any place about the family yard, and, as said in Hartzheim v. Smith, 238 Wis. 55, 298 N.W. 196, the jury could reasonably conclude that under the circumstances shown here if the child was not in sight when Mr. Mertes commenced to back up, that fact should have aroused his concern as to his whereabouts.

In Callahan v. Disorda, 111 Vt. 331, 16 A (2d) 179, it appeared that the plaintiff, a minor, sustained injuries near a private driveway. In the course of its opinion sustaining a

appellants' motion for judgment notwithstanding the verdict should have been sustained. The issues of fact made by the pleadings were submitted to a jury for determination. Whether appellant, Clarence L. Mertes, was guilty of the negligence charged and whether that negligence was the proximate cause of the death of decedent were questions of fact for the jury to determine. The observation of the several witnesses and the weight to be given the testimony of these witnesses are peculiarly within the province of the jury. This unfortunate accident occurred in a private driveway. The decedent was playing in his own yard. Mr. Mertes, when he entered this yard in his automobile, saw decedent and observed him scarcely before he left the front door of the Demont home. He had knowledge of his presence in the vicinity of the place where he subsequently picked him up. He knew his approximate age and that he was walking. After he returned to his car, this appellant looked through the back window and did not see the child, but according to his own testimony he was then wondering where the child was and for that reason was moving his car backward very slowly. As observed in Dawson v. Marty, 98 Tal. App. 888, 277 P. 365, 367, any reasonable man can be charged with knowledge that a child is apt to be found at any place about the family yard, and, as said in Hartshorn v. Smith, 238 Mich. 55, 208 N.W. 182, the jury could reasonably conclude that under the circumstances shown here if the child was not in sight when Mr. Mertes commenced to back up, that fact should have aroused his concern as to his whereabouts.

In Callahan v. Dicorda, 111 Vt. 321, 10 A (2d) 179, it appeared that the plaintiff, a minor, sustained injuries near a private driveway. In the course of its opinion sustaining a

judgment for the plaintiff, the court said: "Whether the defendant, without knowing exactly where the child was when she started to back, but with the knowledge of the child's recent presence nearby and of his liklihood to make sudden and unpredictable actions with which she was charged, acted with the degree of care required . . . . was, on all the evidence, a question for the jury." In its opinion, the Supreme Court of Vermont quoted from Eaton v. S. S. Pierce Co., 288 Mass. 323, 192 N.E. 831 at page 832, where it is stated: "The backing of any vehicle entails more or less limitation on the view by the driver of the area to be traversed, and thus requires corresponding vigilance on his part to avoid causing injury to persons who are known to be, or likely to be, there, whether the vehicle is being backed on a public street or on private land." We have read this record, examined the photographs offered in evidence, considered the arguments submitted by counsel and are clearly of the opinion that the jury was warranted in finding therefrom that plaintiff's intestate came to his death as a result of the negligence charged and that no error was committed by the trial court in submitting the issues to the jury and in its refusal to render judgment in favor of the defendants notwithstanding the verdict of the jury, nor do we think the verdict excessive. Many decided cases have sustained judgments rendered on similar or larger verdicts (Goodrich v. Sprague, 314 Ill. App. 671; 42 N.E.2d, 337; Bunch v. Padva, 333 Ill. App. 24; Flis v. City of Chicago, 247 Ill. App. 128; Bowman v. Woodway Stores, 258 Ill. App. 307).

Counsel for appellants recognize that our courts have held that clothing worn by a deceased person at the time of a fatal accident is admissible in evidence as a general rule (Quincy Gas Co. v.

judgment for the plaintiff, the court said: "Whether the defendant, without knowing exactly where the child was when she started to back, but with the knowledge of the child's recent presence nearby and of his likelihood to make sudden and unpredictable motions with which she was charged, acted with the degree of care required . . . was, in all the evidence, a question for the jury." In its opinion, the Supreme Court of Vermont quoted from Eason v. B. & M. R. R., 289 Mass. 325, 192 N.E. 311 at page 312, where it is stated: "The backing of any vehicle upon more or less limited view by the driver of the area to be traversed, and also requires corresponding vigilance on his part to avoid causing injury to persons who are known to be, or likely to be, there, whether the vehicle is being backed on a public street or on private land." We have read this record, examined the photographs offered in evidence, considered the arguments submitted by counsel and are clearly of the opinion that the jury was warranted in finding therefrom that plaintiff's intestate came to his death as a result of the negligence charged and that no error was committed by the trial court in submitting the issues to the jury and in its refusal to render judgment in favor of the defendants notwithstanding the verdict of the jury, nor do we think the verdict excessive. Many decided cases have sustained judgments rendered on similar or larger verdicts (Goodrich v. Morgan, 319 Ill. App. 237, N.E. 324, 327; Hawk v. Perry, 333 Ill. App. 24; Tiles v. City of Chicago, 347 Ill. App. 1-8; Dowell v. Goolsby Stores, 328 Ill. App. 307).

Counsel for appellants recognize that our courts have held that clothing worn by a deceased person at any time of a fatal accident is admissible as a general rule (Gulsby Gas Co. v.

Baumann, 203 Ill. 295; Tudor Iron Works v. Weber, 129 Ill. 535 539), but insist that in the instant case it was error for the court to admit in evidence a white T-shirt which the mother of decedent testified she had put on her son a short time before the accident and which he wore at the time he was injured. This exhibit was certified to this court, and we have examined it. There were some marks upon it which the jury might reasonably infer from its appearance and from all the evidence in the record ~~that these marks~~ were caused by the tires of appellant Mertes' automobile. The remarks of appellee's counsel to which appellants object occurred when counsel for appellants objected to the admission in evidence of this T-shirt. Counsel for appellants stated that they objected to the admission of this T-shirt in evidence because it did not tend to prove any issue in the case and was offered solely for the purpose of prejudicing the jury. In support of their offer, counsel for appellee said: "If the court please, we feel that this exhibit should be admitted to show the tire marks." To this statement counsel for appellants objected. The objection was sustained and the remark of counsel for appellees was stricken and the jury instructed to disregard it. Previous to this the mother of decedent had testified without objection that when appellant Mertes came to her with decedent in his arms and had told her he had run over him, she took the baby in her arms and she noticed then that he had tire marks on this T-shirt. In our opinion, no reversible error was committed by the trial court in connection with the admission in evidence of this exhibit.

It is finally insisted that the trial court erred in refusing to give to the jury the following instruction tendered by appellants: "The Court instructs the Jury that if they find

Bowman, 201 III. 295; Baker Iron Works v. Baker, 127 Ill. 265), but insist that in the instant case it was error for the court to admit in evidence a white T-shirt which the mother of decedent testified she had put on her son a short time before the accident and which he wore at the time he was injured. This exhibit was identified by the court, and he later examined it. There may be some merit in which the jury might reasonably differ from the conference and from all the evidence in the record. [illegible] were caused by the blows of defendant Hertel's automobile. The remarks of appellee's counsel to which appellants object occurred when counsel for appellants objected to the admission in evidence of this T-shirt. Counsel for appellants stated that objected to the admission of this T-shirt in evidence because it did not tend to prove any issue in the case and was offered solely for the purpose of prejudicing the jury. In support of their offer, counsel for appellee said: "If the court please we feel that this exhibit should be admitted to show the size marks." To this statement counsel for appellants objected. The objection was sustained and the remark of counsel for appellee was stricken and the jury instructed to disregard it. Previous to this the mother of decedent had testified without objection that when appellant Hertel came to her with decedent in his arms and had told her he had run over him, she took the body in her arms and she noticed then that he had size marks on his T-shirt. In our opinion, no reversible error was committed by the trial court in connection with the consideration in evidence of this exhibit.

It is finally insisted that the trial court erred in refusing to give to the jury the following instruction tendered by appellants: "The Court instructs the jury that if they find

for the plaintiff they can only allow such damages as the statute authorizes. The measure of damages it adopts is simply a compensatory one which will make good the loss sustained. That loss must be a pecuniary or money loss and measured by that standard. The mental suffering or grief of survivors, or loss of domestic or social happiness, are not proper elements in the calculation of damages. By the giving of this instruction the Court does not mean to intimate or suggest that plaintiff is or is not entitled to recover, or that plaintiff has or has not sustained actual pecuniary loss by reason of the death of deceased. If you find, from the evidence in this case, under the instructions of the Court, that plaintiff is not entitled to recover, then you need not consider at all the question of damages or whether they are great or small." Appellants' given instruction VI was a word-for-word repetition of this refused instruction except it did not contain the following sentence found in the refused instruction: "The mental suffering or grief of survivors, or loss of domestic or social happiness, are not proper elements in the calculation of damages." An examination of other given instructions fully and clearly advised the jury of the proper measure of damages.

We find no reversible error in this record, and the judgment is therefore affirmed.

Judgment affirmed.

for the plaintiff they can only allow such damages as the statute authorizes. The measure of damages it adopts is simply a compensatory one which will make good the loss sustained. That loss must be a pecuniary or money loss and measured by that standard. The mental suffering or grief of survivors, or loss of consortium or social companionship, are not proper elements in the calculation of damages. In the giving of this instruction the Court does not seem to intimate or suggest that plaintiff is or is not entitled to recover, or that plaintiff has or has not sustained actual pecuniary loss by reason of the death of decedent. If you find, from the evidence in this case, under the instructions of the Court, that plaintiff is not entitled to recover, then you need not consider at all the question of damages or whether they are great or small." Plaintiff's given instruction VI was a word-for-word repetition of this refused instruction except it did not contain the following sentence found in the refused instruction: "The mental suffering or grief of survivors, or loss of consortium or social companionship, are not proper elements in the calculation of damages." An examination of other given instructions fully and clearly advised the jury of the proper measure of damages.

We find no reversible error in this record, and the judgment is therefore affirmed.

Judgment affirmed.

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